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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1936

No. 217

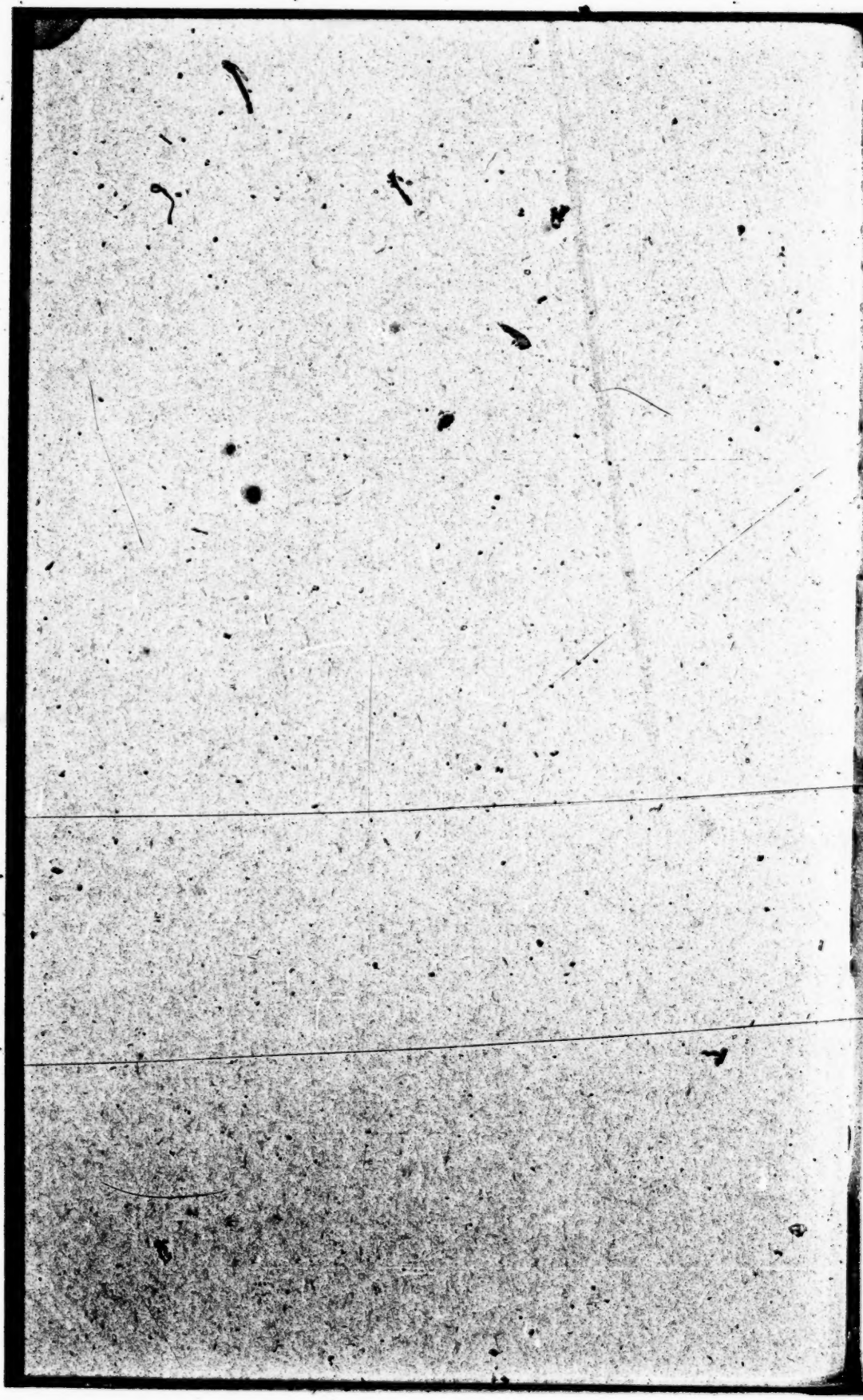
MIDLAND REALTY COMPANY, APPELLANT,

vs.

KANSAS CITY POWER AND LIGHT COMPANY

APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSOURI

FILED JULY 22, 1936.



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[fol. 1]

IN SUPREME COURT OF MISSOURI, DIVISION NO. 1

No. 33028

KANSAS CITY POWER & LIGHT COMPANY, Plaintiff-Appellant,

vs.

MIDLAND REALTY COMPANY, Defendant-Appellant

PRÆCIPE FOR TRANSCRIPT OF RECORD—Filed July 3, 1936

To the Clerk of the Supreme Court of Missouri:

Midland Realty Company, Appellant, hereby calls upon the Clerk of the Supreme Court of Missouri, to include in a transcript of the Record on Appeal of the above entitled cause, to be sent to the United States Supreme Court:

1. All record entries in this case in the Supreme Court of Missouri, including: (a) docketing case, (b) filing of opinion of the Court, (c) filing of Motion for Rehearing, (d) filing of modified opinion of the Court, (e) filing of Motion for Rehearing on modified opinion, (f) orders overruling first and second Motions for Rehearing, (g) order showing filing of and denial of motion to transfer to Court in banc, (h) copy of the judgment entered as of April 23, 1936, (i) the filing of petition for appeal and order of appeal to United States Supreme Court, (j) order showing the filing of and approval of appeal bond.

2. The final opinion of the Court herein.

3. The citation to appear in United States Supreme Court, and acknowledgment of service thereof.

4. The petition for appeal to United States Supreme Court.

[fol. 2] 5. Assignment of errors filed with petition for appeal.

6. Order allowing appeal to United States Supreme Court.

7. Notice of Appeal.

8. The portion of the printed Abstract of the Record in this Court, as is contained in a copy of said printed abstract accompanying this præcipe.

9. Clerk's certificate to the transcript of the record, as sent to the United States Supreme Court.

Scarritt, Jones & North, Elliott H. Jones, Attorneys for Appellant, Midland Realty Company.

Copy of foregoing Præcipe received this July 1st, 1936.

Ludwich Graves, Irvin Fane, Johnson, Lucas, Landon, Graves & Fane, Attorneys for Kansas City Power & Light Company, Appellee.

[File endorsement omitted.]

[fol. 3] IN SUPREME COURT OF MISSOURI

MINUTE ENTRY OF FILING OF JUDGMENT

Be it Remembered That, heretofore, to-wit, on the 12th day of January, 1933, there was filed in the office of the Clerk of the Supreme Court of the State of Missouri, in a cause between Kansas City Power & Light Company, a corporation, Plaintiff-Appellant, and Midland Realty Company, a corporation, Defendant-Appellant, No. 33,028, a certified copy of the judgment of the Circuit Court of Jackson County, and of the order of said circuit court granting an appeal from said judgment to the Supreme Court of the State of Missouri.

IN SUPREME COURT OF MISSOURI

[Title omitted]

MINUTE ENTRY OF SUBMISSION—September 11, 1935

Come now the parties, by their respective attorneys, and after arguments herein submit this cause to the Court.

[fol. 4] IN SUPREME COURT OF MISSOURI

KANSAS CITY POWER & LIGHT COMPANY, a Corporation, Plaintiff-Appellant,

vs.

MIDLAND REALTY COMPANY, a Corporation, Defendant-Appellant

Appeal from Circuit Court of Jackson County

JUDGMENT—January 11, 1936

Now at this day come again the parties aforesaid, by their respective attorneys, and the Court here being now sufficiently advised of and concerning the premises, doth consider and adjudge that the judgment aforesaid, in form aforesaid, by the said Circuit Court of Jackson County rendered, be reversed, annulled and for naught held and esteemed, and that the said plaintiff-appellant be restored to all things which it has lost by reason of the said judgment. It is further considered and adjudged by the Court that said cause be remanded to the said Circuit Court of Jackson County for further proceedings to be had therein, in conformity with the opinion by this Court herein delivered; and that the said plaintiff-appellant recover against the said defendant-appellant its costs and charges herein expended, and have execution therefor. (Opinion filed.)

NOTE.—The opinion as modified appears on page — of this transcript.

IN SUPREME COURT OF MISSOURI

[Title omitted]

MINUTE ENTRY—January 21, 1936

Comes now the defendant-appellant, by attorney, and files herein a motion for rehearing and suggestions in support.

[fol. 5] IN SUPREME COURT OF MISSOURI

[Title omitted]

ORDER MODIFYING OPINION, ETC.—March 10, 1936

Now at this day, it is ordered by the Court that the opinion heretofore rendered herein be, and the same is hereby modified. And now the Court having seen and fully considered defendant-appellant's motion for a rehearing, doth order that said motion be, and the same is hereby overruled.

Which said modified opinion is in words and figures following, to-wit:

[fol. 6] IN SUPREME COURT OF MISSOURI, DIVISION NUMBER ONE, SEPTEMBER TERM, 1935

No. 33,028

KANSAS CITY LIGHT & POWER COMPANY, a Corporation, Plaintiff-Appellant,

vs.

MIDLAND REALTY COMPANY, a Corporation, Defendant-Respondent

OPINION

On February 27, 1908, the defendant entered into a contract with the plaintiff whereby plaintiff agreed to furnish steam heating service to defendant for several of defendant's buildings located in Kansas City, according to a certain schedule of rates set forth therein. This contract was for a period of five years beginning September 1, 1908, and ending August 31, 1913, with an option to defendant to extend the same for an additional five-year period by giving written notice. The option was exercised May 29, 1913. Before the contract had thus been extended the Public Service Commission Law of the State was enacted on March 17, 1913, and became immediately effective. [Laws, 1913, pp. 536-651, inc., R. S. 1929, Chap. 33.]

On June 28, 1917, the plaintiff filed a schedule of rates, effective August 1, 1917, for all of its steam heat customers.

Under this schedule the rates provided were higher than those provided in defendant's said contract.

Early in September, 1917, Kansas City and numerous [fol. 7] users of plaintiff's steam heat service (not including this defendant) filed with the Commission complaint against said schedule. After hearings had thereon the Commission, on February 11, 1918, found said rates to be "unjust and unreasonable and said rates and prices unreasonably high." [Case No. 1353, 5 P. S. C. Mo. 20.] Thereupon the Commission by order fixed and established as just and reasonable a lower schedule of rates and made same effective March 1, 1918. Plaintiff filed a new schedule accordingly. This rate also was higher than defendant's contract rate. It is to be noted that in its case No. 1353 the Commission made no attempt to separate or to allocate values and operating expenses as between heating and electrical services, and was unwilling to do so "without further investigation."

On June 11, 1918, plaintiff entered complaint before the Commission charging that its rates for electric service and for steam heat were inadequate and confiscatory. This complaint was docketed and heard as case No. 1615. [8 P. S. C. Mo. 223.] In this latter proceeding the Commission made the allocation which had been omitted in the other case, predicating the same upon its finding that the rates put into effect March 1, 1918, were "inadequate, unjust and unreasonably low, and that during none of the time was heating revenue sufficient even to meet the fuel expenses alone." And the Commission established new rates which displaced the next previous schedule of March 1, 1918. This new schedule did not become effective until December, 1919, as to steam heat, and was even higher than either of the next two preceding schedules. The Commission further found that "heretofore the steam heat business has been carried at a loss, and this loss has been borne either by the light and power consumers or by the company. This is a distinctly inequitable condition which must be eliminated as soon as practicable." The findings and order of the Commission established in said case No. 1615 were approved by this court in State ex rel. Mary B. Case, et al. v. Pub. Service Comm. et al., 298 Mo. 303, 249 S. W. 955.

After August 1, 1917, plaintiff billed defendant for its [fol. 8] steam heating service under the schedule effective

on that date until March, 1918, and thereafter under the schedule of the latter date until August 31, 1918, which was the date defendant claimed its contract expired: but defendant refused to pay as billed and made payments still in accordance with the rate in its contract, claiming said rates still to be effective, and such payments were credited on account by the plaintiff; the latter claiming the filed schedule rate was the legal and only rate that could be lawfully charged, and that the defendant's rate contract was void.

This case is for the recovery by the plaintiff from the defendant of the difference between the rates claimed to have been effective and the contract rates for the period August 31, 1917, to March 1, 1918, (pleaded in the first five counts of the petition), and the difference between the rates effective March 1, 1918, and the contract rates for the period from that date to and including August 31, 1918 (pleaded in the last six counts). The court nisi, on a trial without a jury, found against the plaintiff on the first five counts of the petition, and found for the plaintiff on the remaining six counts. Both parties appealed.

The foregoing statement with only slight change is the same as the statement contained in plaintiff's brief and conceded by defendant to be correct. The matters, orders and records referred to in the statement were all introduced in evidence on the trial. Apart from that there was no further evidence save the case of Marty, et al. v. Kansas City Light & Power Co., 303 Mo. 233, 259 S. W. 793, which was introduced. There is no dispute between the parties relative to the amount of the overplus of the schedule rates above defendant's contract rate. This case is before this court because of the constitutional questions of alleged impairment of obligations of contract and denial of due process raised as issues of law herein upon the undisputed facts.

The first contention of the parties is upon the legal effect of the rate schedule filed by plaintiff, as to which the Commission made no order between the date it was filed and the effective date, August 1, 1917.

[fol. 9] The defendant concedes that the schedule of August 1, 1917, may have been prima facie a legal one upon its filing as to non-contract customers, but was actually not lawful as so determined by the Commission upon a hearing thereon and the finding that "said schedule rates were un-

reasonably high and unjust and, therefore, unlawful." [P. S. C. Case No. 1353.] Defendant asserts that the last mentioned order was final and conclusive under Section 5238, R. S. 1929, which provides: "In all collateral actions or proceedings the orders and decisions of the commission which have become final shall be conclusive."

This schedule covering the period of its operation was considered and passed upon in State ex rel. Mary B. Case, et al., v. Pub. Service Comm., 298 Mo. supra, a proceeding to review the findings and order made by the Commission [Case No. 1615, 8 P. S. C. Mo. p. 223.], wherein our court on appeal, after reviewing said schedule and the proceedings leading to its establishment, held that the rates as fixed thereby were, under the statute (Sec. 5247, R. S. 1929), prima facie lawful and that the burden of proof rested upon the claimants to show by clear and satisfactory evidence that the order complained of was unreasonable, or unlawful as the case might be; and further held that the evidence (same as in this case) did not show that the rates attacked were unreasonable or unlawful. The court also determined that the allocation made by the Commission through its order in its case No. 1615 was not erroneous, but "was as accurate, fair and just, as reasonably possible or obtainable and should not be disturbed."

The Marty Case supra was a suit brought by heating service users of Kansas City against the plaintiff in this case to recover the amount of alleged excess charges paid by them for steam heat furnished during the period covered by the rate schedule now under consideration. That case involved the same evidence that is in this case. The opinion therein points out that no order having been made by the Commission suspending said schedule which materially increased the rates for heat, the same took effect after August 1, 1917. The plaintiffs there attacked said schedule as being unreasonable, excessive and unlawfully high, and [fol. 10] as unlawful in that it was filed without notice. In support of those issues the plaintiffs introduced in evidence the finding and order of February 11, 1918, in the making of which (Case No. 1353, 5 P. S. C. Mo. p. 20) no attempt was made to separate or allocate values and operating expenses as between users of heat and electricity. The court (l. c. 242) pointed out that the Commission did find that the heating rates under the plaintiff's schedule in effect from

August 1, 1917, to March 1, 1918, were excessive, and the Commission established a lower scale, which was yet higher than the one in effect prior to August 1, 1917. In response to the contention that this finding was conclusive in the collateral proceeding there at hand the court, after discussing the various orders and record facts which we have referred to in our statement, and after reviewing State ex rel. Mary B. Case, et al. v. Public Service Commission, supra, denied the contention, and held that the findings and order made by the Commission in the later case No. 1615, and sustained by this court in Mary B. Case's suit, wholly destroyed the general prior findings made by the Commission, with the result that there was no substantial evidence before the court that the rates which the consumers paid from August 1, 1917, to March 1, 1918, were excessive and unlawful, for on that matter the subsequent finding of the Commission was to the contrary. The court specifically held that defendant's previous schedule was prospective in operation and made without prejudice as to what might thereafter be shown on a fuller investigation and upon actual tests; that the order of January 11, 1918, fixed prospective rates only; that the rates which plaintiffs did actually pay were so low as to be confiscatory of the property of the defendant; (citing Vandalia R. R. Co. v. Schnull, 255 U. S. 113) and that the rate paid by the consumers from August 1, 1917, to March 1, 1918, was lawful, having been filed and having gone into effect under present Sections 5247 and 5228, R. S. 1929, and was further lawful in that it was neither unreasonable nor excessive as against the consumers and was unremunerative to the defendant. The court denied recovery.

We approve the construction thus placed on said rating [fol. 11] statutes. So, the filing by plaintiff of the rates effective August 1, 1917, primarily fixed by plaintiff's schedule were in the circumstances the effective rates pro tempore, though their reasonableness was not thereby finally determined. They were, in effect, subsequently found by the Commission, upon an investigation and hearing, to be not unreasonable or excessive but inadequate, unjust and unreasonably low; the steam heating service was given thereunder at a complete loss, of which the entire burden was placed upon the light and power consumers or on this plaintiff; and such rates were inequitable as to

such consumers, or confiscatory of this plaintiff's property. There is in this record no evidence to the contrary. In either view, therefore, the continuance of the same was against the public welfare. It follows a priori that the maintenance of a lower rate (the contract rate) than the later established rate was likewise against the public good. It was not only manifestly so but the statute expressly made it so. This statute [R. S. 1929, Section 5189], so far as pertinent reads: "No gas corporation, electrical (or heating) corporation, water corporation or municipality shall make or grant any undue or unreasonable preference or advantage to any person, corporation or locality, or to any particular description of service in any respect whatsoever, or subject any particular person, corporation or locality or any particular description of service to any undue or unreasonable prejudice or disadvantage in any respect whatsoever." This statute establishes a public policy for the public good, in the reasonable and non-discriminatory exercise of delegated police power.

It is argued for the defendant that paragraph 4 of Section 5208 of the statute expressly preserves heating contracts existing at the time the Act was passed. That section in its salient clause declares: "Nothing in this chapter shall be construed to prevent any telegraph or telephone corporation from continuing to furnish the use of its line, equipment or service under any contract or contracts in force at the date this article takes effect or upon the taking effect of any schedule or schedules of rates subsequently [fol. 12] filed with the Commission, as hereinafter provided, at the rate or rates fixed in such contract or contracts * * *." It is asserted that section 5228, which purports to extend the power of the Commission in relation to various other utilities "so far as the same shall be practical legal or necessary", is applicable to heating corporations.

It seems to be well settled by our decisions that the Commission has the power to fix by order reasonable telephone, light, power and heating charges at rates exceeding the maximum prescribed by ordinance, franchise, or individual contracts; that such an order does not in the constitutional sense impair the obligations of such contracts; and that such rates automatically supersede all rates coming into conflict therewith. [State ex rel. Sedalia v. Pub. Serv. Comm. 275 Mo. 201; 204 S. W. 497; City of Fulton v.

Pub. Serv. Comm.—in banc—275 Mo. 67, 204 S. W. 386; K. C. Bolt & Nut Co. v. Light & Power Co.—in banc—275 Mo. 529, 204 S. W. 1074; State ex rel. Washington Univ. v. Pub. Serv. Comm.—in banc—308 Mo. 328, 272 S. W. 971.] The decisions in the cited cases are based upon the theory that, since our State Constitution (Art. 12, sec. 5) declares that "the exercise of the police power of the state shall never be abridged", it can not be contracted away; and under the theory that our Public Service Commission is not a court and can not enforce contracts; but deals with public utilities upon the theory of public service, without regard to any contracts; that it is a fact-finding body whose findings and orders, being prima facie reasonable and lawful, are subject to judicial review in that respect only.

The Bolt and Nut Company Case supra is essentially similar to the case at bar. There a public service corporation by written contract agreed to supply electric energy to a private manufacturer for a designated length of time at designated rates. Higher rates were subsequently fixed by the State Public Service Commission by the adoption of a schedule applicable for all services of the kind furnished by the service corporation. The court in banc held that the latter rates, being reasonable, automatically superseded all contract rates coming in conflict with them, and the court denied injunction sought to re-[fol. 13] strain the collection of the increased rates. The case was affirmed on appeal to the Federal Supreme Court [252 U. S. 571, No. 241] upon the authority of Union Dry Goods Co. v. Georgia Pub. Serv. Corp. 248 U. S. 372, 9 A. L. R. 1320.

The Washington University Case supra was a direct attack made against an order of the Commission raising rates of a light and power company for electric and heating service. The increased rates were attacked by some 18 consumers who had previously entered into term contracts with the company for a lower rate than that fixed by the Commission. This court held (l. c. 342): "These contracts are of no validity, in so far as they affect rates. The Public Service Commission, in fixing rates, can not be clogged or obstructed by contract rates. This question was early threshed out by this court in several cases, some of which went to the Federal Supreme Court, in each of which this court was sustained. The original case, the ruling in which has never been changed, is State ex rel. City of Sedalia v.

Public Service Commission, 275 Mo. 201. As said, such body is not a court, and has neither the power to construe contracts nor to enforce them."

So, in the light of our decisions supra, we have no hesitancy in reaffirming that the statute purporting to preserve existing contracts does not operate to exempt such contracts from the scope of the exercise of the police power of the State to protect or promote the general or public welfare by regulating rates of public utilities so as to raise or lower, as the case may be, previously existing contract rates. We are of the opinion that the Commission's findings and order expressly made are in legal effect, since there was no substantial evidence to the contrary, decisive that said contract rate was unreasonable, and that said rate schedule in question superseded the contract rate and rendered the latter nugatory.

The defendant contends strenuously that this can not be [fol. 14] so; that "before a contract for a utility rate, entered into before the passage of the Public Utility Act, can be deemed to have been abrogated, it is essential that the Commission, in the course of an orderly procedure, viz., in a procedure in which the affected parties and the subject matter of the contract are before it, make an express finding that the contract rates are unreasonable." This contention goes alike to all the counts. It invokes the contract clause, and the due process clause of the Fourteenth Amendment, of the Federal Constitution. The chief federal cases cited and relied upon by the defendant are Arkansas National Gas Co. v. Arkansas R. Comm. 261 U. S. 379, 67 L. Ed. 705 and Wichita R. & L. Co. v. Public U. C. 260 U. S. 48, 67 L. Ed. 124.

In the Arkansas Case the Public Utility sought injunction against the continuance of rates fixed by contract with consumers, on the ground that they were virtually confiscatory of the property of the utility company as the result largely of improper and wasteful methods of the particular consumers holding the contracts. There was no claim that rates to other consumers were affected by those contracts, nor did it appear that the public interest was involved in the action which the Commission was asked to take. The court, after pointing out the power of the state to regulate public utilities and fix rates, notwithstanding what the effect might be to modify or abrogate private contracts, said (l. c. 382): "There is, quite clearly, no principle which im-

poses an obligation to do so merely to relieve a contracting party from the burdens of an improvident undertaking. The power to fix rates, when exerted, is for the public welfare, to which private contracts must yield, but it is not an independent legislative function to vary or set aside such contracts, however unwise and unprofitable they may be. Indeed, the exertion of legislative power solely to that end is precluded by the contract impairment clause of the Constitution. The power does not exist per se. It is the intervention of the public interest which justified and at the same time conditions its exercise." In the present case there was no purpose to relieve the plaintiff of an improvident [fol. 15] undertaking. Another feature which distinguishes that case from the instant case is shown above; it consists in that here the inadequate rates for heating service were unreasonable and grossly discriminatory as between the users of that service and the users of electrical service, and yielded no revenue from the first mentioned service. Detriment to the public interest by any recognition of the contract rate is implicit in the later findings and orders made by the Commission.

In the Wichita case the Public Utility Commission of Kansas put into effect a schedule of rates in lieu of contract rates. This schedule was filed by the Wichita company and purportedly went into effect with the consent of the commission without a hearing or a finding or a decision involving the same. The Federal Supreme Court adopted the construction which the Kansas Court had placed upon its rating statutes, holding that that schedule was not effective in lieu of the contract rates, and that, in any event, rates previously agreed upon between utilities and patrons will continue in force until the commission has found them to be unreasonable and has prescribed other rates. The court added: "This conclusion accords with the construction put upon similar statutes in other states. Public Utility Comm. v. Springfield Gas & Elec. Co. 291 Ill. 209; Public Utility Comm. v. B. & O. S. W. R. R. Co. 281 Ill. 405. Moreover, it accords with general principles of constitutional government."

These principles were stated thus: "In creating such an administrative agency the legislature, to prevent its being a pure delegation of legislative power, must enjoin upon it certain rules of procedure and certain rules of decision in the performance of its function. It is a wholesome and

necessary principle that such an agency must pursue the procedure and rules enjoined and show a substantial compliance therewith to give validity to its action. When, therefore, such an administrative agency is required as a condition precedent to an order to make a finding of facts, the validity of the order must rest upon the needed finding. If it is lacking, the order is ineffective."

[fol. 16] Under the construction our court has placed upon our statute authorizing substituted rates for existing rates the statute does not require any finding of facts, or the making of any order as a condition precedent to the validity of plaintiff's schedule of 1917 and its effectiveness as of August 31, 1917. As regards the Commission's schedule of substituted rates of March 1, 1918, it does appear that the same rested upon an express finding of facts and orders of the Commission as foundational. In each instance the Commission met the requirements of our statutes. These observations and others made earlier herein point out sufficiently, we think, the distinction between the Wichita Case and this case, especially as the Federal Courts in their consideration of local constitutions and statutes will follow the construction placed upon them by the state courts. [Georgia Ry. Co. v. Decatur, 262 U. S. 432, 437.]

Furthermore, since the Commission was without judicial power to determine finally the defendant's rights under the contract, but only the facts controlling such rights prima facie and tentatively, it would seem that as yet there has been no infringement upon defendant's constitutional guaranties against impairment of contract or denial of due process of law. From the number of cases that have come to this court and the number of parties involved in them, it may fairly be inferred that the rate schedules in question were of more than passing local interest and notoriety, and that the defendants were aware of them from the beginning. The usual process of the courts to determine the validity of the controverted schedules, was available to either party, although defendant was under no necessity to avail itself thereof, since the heat service was not shut off. Yet the matter was in dispute between the parties from the time of the first change in the rate schedule. This suit was brought in 1921, and as stated in the briefs was continued thereafter [fol. 17] by common consent, presumably awaiting some fortuitous decision of some kindred case, until it went to

trial some eleven years later. Usual process is being availed of by the defendant as well as by the plaintiff in this proceeding, in a mode of procedure provided by the State and adequate to safeguard and determine defendant's contractural rights in the premises. This, we think, meets the requirements of the constitutional right to due process of law. [Hurtado v. California, 110 U. S. 516, l. c. 534, 535.]

The court nisi, pursuant to its denial of declarations of law offered by the defendant, found and adjudged, in substance, as follows: (1) That paragraph 4 of Section 5208 did not operate to keep in force and effect defendant's contract in question during the period involved in counts six to eleven, inclusive, of plaintiff's petition; (2) that to permit plaintiff to recover on said counts six to eleven, inclusive, would be in violation of said contract clause, and the due process clause of the Fourteenth Amendment, of the Constitution; and pursuant to an instruction given at defendant's request the court found and adjudged (3) that to permit plaintiff to recover on counts one to five, inclusive, would be in violation of said contract and due process clauses.

We are of the opinion that that part of the trial court's decision relating to counts one to five, inclusive, was erroneous and that in respect of counts six to eleven, inclusive, it was correct. As has already been pointed out there is no substantial evidence in the record to support the trial court's denial of a recovery on the first five counts. The entire record made by the Commission was presented to the trial court for a present determination from the whole record as a matter of law whether the same contains findings made by the Commission which in form or in essence impel the conclusion that during the periods in controversy the defendant's contract rate was unreasonable and against the public interest and was superseded and supplanted by the rate schedules in question. We are of the opinion that such is the proper conclusion. This conclusion is reinforced by [fol. 18] the somewhat analogous case of Denny v. Pac. Tele. & Tele. Co., 276 U. S. 97, 72 L. Ed. 483, 48 Sup. Ct. Rep. 223, cited by the plaintiff.

The Denny Case dealt, as we are now dealing, with facts accomplished. The court therein, responding to a contention similar to the principal one made by defendant, herein said: " * * * It appears to be argued that the

rates provided in the contract should continue until the commission makes an order specifically declaring and directing in so many words that the contract shall be terminated. We may look over the fact, if need be, that upon the petition of the city the rates were reduced in 1913, and that in 1918 they were increased upon application of the Gas Company, and consider the franchise contract as having been wholly undisturbed until the present time, and still we would be compelled to determine, as we do determine, that the present o-der of the Department of Public Works is just as effective as if, after fixing the rates, there had been added thereto the words 'and it is hereby directed that the rates provided in the franchise shall be and they are hereby terminated', or words of similar import. That is the legal effect of what was done, and the form or the language by which it was imported is not very material."

So, on the predetermined and undisputed facts before us we hold that the contract in controversy should be deemed nugatory from and after August 31, 1917.

The judgment of the circuit court is reversed and the cause remanded with directions to enter judgment for the plaintiff on all counts of the petition as prayed therein.

All concur.

Charles Thomas Hays, Judge.

[fol. 19] IN SUPREME COURT OF MISSOURI

[Title omitted]

MINUTE ENTRY—March 20, 1936

Comes now the defendant-appellant, by attorney, and files herein a motion for rehearing on the modified opinion.

IN SUPREME COURT OF MISSOURI

[Title omitted]

ORDER OVERRULING MOTION FOR REHEARING—April 23, 1936

Now at this day, the Court having seen and fully considered defendant-appellant's motion for rehearing on the

modified opinion, doth order that said motion be, and the same is hereby overruled.

[fol. 20] IN SUPREME COURT OF MISSOURI

KANSAS CITY POWER & LIGHT COMPANY, a Corporation, Plaintiff-Appellant,

vs.

MIDLAND REALTY COMPANY, a Corporation, Defendant-Appellant.

Appeal from Circuit Court of Jackson County

JUDGMENT—June 8, 1936

Now at this day, it appearing to the Court that the mandate dated January 11, 1936, and issued on May 23, 1936, has been recalled pursuant to an order of this Court heretofore entered herein. And it appearing to the Court from further examination of the record and the opinion of this Court, rendered on January 11, 1936, as modified March 10, 1936, that the conclusion in said opinion and the judgment entered thereon do not conform to the record in said cause, and the findings contained in said opinion. It is therefore ordered by the Court that the opinion be, and the same is hereby modified, nunc pro tunc, to conform with the record and findings in said opinion. And it is further ordered that the judgment, nunc pro tunc, be entered as of April 23, 1936, the date on which said motion for rehearing on the modified opinion was overruled, which said nunc pro tunc judgment is as follows: Now at this day come again the parties aforesaid, by their respective attorneys, and the Court here being now sufficiently advised of and concerning the premises, doth consider and adjudge that the judgment aforesaid, in form aforesaid, by the said Circuit Court of Jackson County rendered, be reversed, annulled and for naught held and esteemed, and that the said plaintiff-appellant be restored to all things which it has lost by reason of said judgment. It is further considered and adjudged by the Court that the said cause be remanded to the said Circuit Court of Jackson County with directions

to enter judgment for the plaintiff on all counts of the petition as prayed therein; and that the said plaintiff-appellant recover against the said defendant-appellant its costs and charges herein expended and have therefor execution.

[fol. 21] IN SUPREME COURT OF MISSOURI

[Title omitted]

ORDER OVERRULING MOTION TO TRANSFER TO COURT EN BANC —June 18, 1936

Comes now the defendant-appellant, by attorney, and after obtaining leave of court files herein a motion to transfer to court en banc; and the Court having seen and fully considered said motion to transfer to court en banc doth order that said motion be, and the same is hereby overruled.

[fol. 22] IN SUPREME COURT OF MISSOURI

[Title omitted]

ORDER ALLOWING APPEAL—June 27, 1936

The petition of Midland Realty Company, Appellant in the above entitled cause, for an appeal therein to the Supreme Court of the United States from the Supreme Court of the State of Missouri, Division No. 1, and the Assignment of Errors filed therewith, and the record of said cause having been considered; it is ordered, that an appeal be and is hereby allowed to the Supreme Court of the United States from the Supreme Court of the State of Missouri, Division No. 1, as prayed in said petition.

It is further ordered that the Appellant execute to the Respondent, the Kansas City Power & Light Company, its bond, with surety to be approved by the undersigned, in the sum of $7,000, conditioned according to law.

It is further ordered that the Clerk of this Court, within forty days from this date, make and transmit to the Clerk

of the United States Supreme Court, under his hand and the seal of this Court, a transcript of the record herein, containing a true copy of all material parts of the record herein, which shall be designated by præcipe filed with him by any of the parties hereto.

Done this 27th day of June, 1936.

Charles T. Hays, Presiding Judge of the Supreme Court of Missouri, Division No. 1. George Robb Ellison, Chief Justice of the Supreme Court of Missouri.

[fol. 23] IN SUPREME COURT OF MISSOURI

[Title omitted]

PETITION OF MIDLAND REALTY COMPANY FOR AN APPEAL TO THE SUPREME COURT OF THE UNITED STATES—Filed June 27, 1936

Considering itself aggrieved by the final decision of the Supreme Court of the State of Missouri, in the above entitled cause, the Midland Realty Company, a corporation, defendant herein, and Appellant and Respondent in this Court, hereby prays that an appeal by this defendant be allowed to the Supreme Court of the United States herein to the end that said judgment of the Supreme Court of Missouri, Division No. 1, may be there reviewed and considered and justice done this appellant, and that an order be made fixing the amount of the bond required of appellant herein on such appeal. Said appellant submits and files herewith its Assignment of Errors upon such appeal.

As ground for appeal herein and for the jurisdiction of the United States Supreme Court on this appeal, Appellant shows that on February 27, 1908, it entered into a contract, in evidence, with appellee herein, or its predecessor company, for steam heating service, at the rates therein named, for a term beginning September 1, 1908, and ending August 3, 1918, and that appellee furnished steam to appellant during the whole term of said contract, and that [fol. 24] appellant paid in full, according to contract, for said service; that in the year 1913 there was enacted what is known as the Public Service Commission Act of Mis-

souri (Chapter 33, R. S. Mo. 1929); that, by virtue of said Act, appellee filed with the Public Service Commission on June 19, 1917, a schedule of rates for steam heat service, for its customers generally, but no finding or order was made by the Commission with respect thereto. The rates named in said schedule were higher than the rates provided in said contract. In the first five counts of its petition herein plaintiff, appellee, seeks to recover of this appellant the difference between what is paid, according to said contract, for heat service from October 1, 1917 to March 1, 1918, and what appellee claims that appellant should have paid, according to said filed schedule.

On February 11, 1918, said Commission made a finding and order setting aside the said filed schedule of rates, as being unlawful, and promulgated a schedule of heating rates, effective March 1, 1918, for appellee's heat customers, generally, in which the named rates were somewhat higher than those named in appellant's contract aforesaid. Appellant's said contract was not at any time considered by said Commission, or other tribunal, and no finding or order was ever made with respect thereto, and appellant continued, thereafter, to receive steam heat service from appellee and to pay for the same, according to contract, until said contract expired on August 31, 1918. Plaintiff, appellee, seeks to recover, in the last six counts of its petition herein, the difference between what appellant paid, according to contract, and what appellee claims that appellant should have paid, according to said promulgated schedule, for heating service from March 1, 1918, to August 31, 1918.

Plaintiff, appellee here, asserts that by virtue of the provisions of said Public Service Commission Act, appellant's said contract was abrogated and rendered nugatory upon [fol. 25] and by the mere filing of said schedule of heating rates on June 19, 1917. Appellant, in its answer herein, and otherwise contends that said act (Chapter 33, R. S. Mo. 1929), so construed and applied as to abrogate and render nugatory said contract, without any hearing or finding or order by the Commission, or other tribunal, with respect to said contract, violates and is repugnant to Section 10 of Article I of the Constitution of the United States, which provides that no State shall pass any law which impairs the obligation of contracts, and violates the Four-

teenth Amendment to said Constitution, which prohibits the taking of one's property without due process of law.

The decision of the Supreme Court of Missouri, the highest Court of the State, was against the contention of appellant, and in favor of the contention of plaintiff, appellee, and in favor of the validity of said statute, as so construed and applied, and said Court directed that plaintiff have judgment, as prayed, on all Counts of its petition.

Elliott H. Jones, Attorney for said Appellant.
Scarritt, Jones & North, of Counsel.

[fol. 26] IN SUPREME COURT OF MISSOURI

ASSIGNMENT OF ERRORS—Filed June 27, 1936

Comes now the Appellant above named, Midland Realty Company, and as appellant to the Supreme Court of the United States from the judgment and decision heretofore entered in the Supreme Court of Missouri, Division No. 1, assigns as error:

(1) The Supreme Court of Missouri erred in ruling that the schedule of heating rates, which was merely filed with the Public Service Commission of Missouri by plaintiff on June 19, 1917, with the effective date August 1, 1917, without any hearing, finding, or order of the Commission thereon had the effect of abrogating or rendering nugatory the contract, in evidence, between the defendant and the Kansas City Heating Company, plaintiff's predecessor, dated February 27, 1908, and the effect of such decision of the Supreme Court of Missouri herein was to cause the taking of and property rights of defendant, appellant, in said contract, without due process of law, in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

(2) The Supreme Court of Missouri erred in ruling that the schedule of steam heating rates filed on February 11, 1918, with effective date March 1, 1918, put into effect, as to steam heat customers, generally, had the effect of abrogating or rendering nugatory the contract between defendant, appellant, and Kansas City Heating Company, plaintiff's predecessor, dated February 27, 1908, shown in the

record herein. And the effect of said decision and judgment of the Supreme Court of Missouri was to take the property and the property rights of the defendant, appellant herein, in said contract, without due process of law, in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

(3) The contract, in evidence, between defendant and Kansas City Heating Company, predecessor to plaintiff, [fol. 27] was fully performed, on both sides, throughout its full term, and defendant's rights thereunder became fully vested. In awarding to plaintiff a sum or sums over and in excess of what defendant paid, which was in full compliance with said contract, for the heating service concerned herein, the decision of the Supreme Court of Missouri herein has served to take defendant's vested rights in said contract without due process of law, in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

(4) The Supreme Court of Missouri erred in refusing to hold that paragraph 4 of Section 5208, R. S. Mo., 1929, denied the power to the Public Service Commission or to the Courts to abrogate defendant's said contract, in evidence, for heating service. The effect of such ruling was to take defendant's property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States, and to so interpret and apply the Missouri statute, known as the Public Service Commission Act, as to impair the obligation of said contract, in violation of Section 10 of Article I of said Constitution.

(5) The said Supreme Court of Missouri, in awarding a recovery to plaintiff, on the first five counts of its petition herein, by reason of and based upon a schedule of heating rates which the Public Service Commission of Missouri, acting within its proper and exclusive province, upon a due and proper hearing, had conclusively found and declared to be unreasonable, unlawful and void, has taken defendant's property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States.

(6) The decision of the Supreme Court of Missouri, Division No. 1, herein, to the effect that the mere passage

of the Public Service Commission Act of Missouri (Chapter 33, R. S. Mo. 1929) and the mere filing by the public utility company of a schedule of rates (concerned in the first five counts of the petition) for its service to its cus-
[fol. 28] tomers, generally, in accordance with said Act, or the mere putting into effect by the Public Service Commission of a schedule of rates (concerned in the last six counts of the petition) for the service of said utility company, for its customers, generally, had the effect of abrogating or rendering nugatory defendant's said contract with such utility company, which contract was made and entered into prior to the passage of said Public Service Commission Act, although there never was any hearing or proceeding before the Public Service Commission, or other tribunal with reference to said contract, or any finding that said contract ought to be or should be abrogated in the interest of the public welfare, or otherwise, was such as to violate Section 1 of the Fourteenth Amendment to the Constitution of the United States, which provides that one's property cannot be taken without due process of law, and to violate Section 10 of Article I of the Constitution of the United States, which provides that no State shall pass any law impairing the obligation of a contract.

For which errors the Appellant above named, Midland Realty Company, a corporation, prays that the said judgment and decision of the Supreme Court of the State of Missouri, Division No. 1, dated April 23, 1936, in the above entitled cause, be reversed and that judgment be ordered in favor of the said Appellant, and for costs.

Elliott H. Jones, Counsel for said Appellant. Searritt, Jones & North, of Counsel.

[fol. 28½] [File endorsement omitted.]

[fol. 29] Citation, in usual form, showing service on L. Graves, omitted in printing.

[fol. 30] IN SUPREME COURT OF MISSOURI

[Title omitted]

NOTICE OF APPEAL—Filed July 3, 1936

To the Appellee, Kansas City Power & Light Company, or its attorneys of record:

You will please take notice that defendant, Appellant, Midland Realty Company, feeling aggrieved by the judgment rendered in the above entitled cause on April 23, 1936, in the Supreme Court of Missouri, Division No. 1, has appealed from said judgment to the United States Supreme Court, a copy of Appellant's petition for appeal being hereto attached.

Elliott H. Jones, Attorney for said Appellant.

Copy of the foregoing Notice, and of the petition for appeal, received this July 1st, 1936.

Ludwich Graves, Irvin Fane, Johnson, Lucas, Landon, Graves & Fane, Attorneys for Appellee, Kansas City Power & Light Company.

[File endorsement omitted.]

[fol. 30-1] IN SUPREME COURT OF MISSOURI, DIVISION NO. 1, SEPTEMBER TERM, 1935

No. 33028

KANSAS CITY POWER & LIGHT COMPANY, a Corporation, Plaintiff-Appellant,

vs.

MIDLAND REALTY COMPANY, a Corporation, Defendant-Appellant

Appeals from the Circuit Court of Jackson County, Missouri, Division No. 3

Hon. T. J. Seehorn, Judge

Joint Abstract of Record of Plaintiff-Appellant and Defendant-Appellant

RECORD PROPER

FOREWORD

In the above entitled cause all proceedings hereinafter named were had and taken in the Circuit Court of Jackson County, Missouri, at Kansas City.

The caption in all pleadings, signatures, judgment and orders, except as to the term, were as follows: "In the Circuit Court of Jackson County, Missouri, at Kansas City. [fol. 30-2] Kansas City Power & Light Company, a corporation, plaintiff, vs. Midland Realty Company, a corporation, defendant, No. 160617."

All proceedings hereinafter mentioned and referred to were had in the Circuit Court of Jackson County, Missouri, and all pleadings were filed in the Circuit Court of Jackson County, Missouri, as shown by the records and filings of said court. For the sake of brevity, captions and signatures are omitted in this abstract, but were fully set out in the original papers.

Petition

This case went to trial on the 27th day of August, 1932, the same being the sixtieth day of the May term, 1932, of the said court, before Hon. T. J. Seehorn, Judge of Division

No. 3 of the Circuit Court of Jackson County, Missouri, a jury trial having theretofore been waived, upon the following second amended petition, duly filed in the Circuit Court of Jackson County, Missouri, at Kansas City:

SECOND AMENDED PETITION

Count I

1. The Kansas City Power & Light Company says that it is a corporation organized and existing under the laws of the State of Missouri, and is engaged in the production, distribution and selling of electricity for light, heat and power and steam for heating in Kansas City, Missouri, and [fol. 30-3] is a public utility company subject to the laws of the State of Missouri and the orders of the Public Service Commission of the State of Missouri, and further states that it is the successor of the Kansas City Light & Power Company, a corporation, and of the Kansas City Heating Company, a corporation, and is the owner and assignee of all the choses in action, rights and privileges, accounts, property, contract and assets of said companies.

2. That at all of the times hereinafter mentioned, the Kansas City Light & Power Company was a corporation organized and existing under the laws of the State of Missouri, and engaged in the production, distribution and selling of electricity for light, heat and power and steam for heating in Kansas City, Missouri, and was a public utility company subject to the laws of the State of Missouri and the orders of the Public Service Commission of the State of Missouri.

3. That the defendant is and was at all of the times hereinafter mentioned a corporation duly organized and existing according to law.

4. That prior to August 1, 1917, to-wit: on June 19, 1917, the Kansas City Light & Power Company filed with the Public Service Commission of the State of Missouri the rates to be charged on and after August 1, 1917, by the Kansas City Light & Power Company to its customers for heat as follows:

"Steam Heating Service"

First	50,000	lbs.	of	condensation	per	mo.	$1.00	per	1000 lbs.
Next	50,000	"	"	"	"	"	.90	"	" "
Next	100,000	"	"	"	"	"	.80	"	" "
Next	200,000	"	"	"	"	"	.75	"	" "
Next	400,000	"	"	"	"	"	.70	"	" "

All in excess of 800,000 lbs. of condensation per month, 60c per thousand lbs.

[fol. 30-4] That said rates so filed on June 19, 1917, with the Public Service Commission of the State of Missouri, were not ordered suspended by the said Public Service Commission, and went into full force and effect on August 1, 1917, and became the lawful rates for heat and the only rates for heat that could be charged by the Kansas City Light & Power Company to its customers for heat for the period from and including August 1, 1917, to and including April 30, 1918.

5. Plaintiff further states that at the said rates on file with the Public Service Commission, the Kansas City Light & Power Company furnished to defendant for heating the buildings at the southwest corner of Tenth and Oak Streets, northwest corner of Tenth and McGee Streets, No. 1008 Oak Street, and at the southeast corner of Tenth and McGee Streets, in Kansas City, Missouri, from the 1st day of October, 1917, to the 31st day of October, 1917, steam for heating of the value, according to said rates, of six hundred fifty & 50/100 ($650.50) dollars; that the delinquent date for the payment of said bill was November 15, 1917, said bill having been duly rendered to the defendant by the Kansas City Light & Power Company on or before November 5, 1917; that on December 18, 1917, the defendant paid on account of said bill the sum of three hundred forty-four & 85/100 ($344.85) dollars, leaving a balance due and unpaid upon said bill of three hundred and five & 65/100 ($305.65) dollars which defendant refused to pay and still refuses to pay.

6. Wherefore, plaintiff prays judgment against the defendant on the first count for the sum of three hundred and [fol. 30-5] five & 65/100 ($305.65) dollars, with interest on six hundred fifty & 50/100 ($650.50) dollars from November 16, 1917, to December 18, 1917, and interest on three hundred and five & 65/100 ($305.65) dollars from December 19, 1917, until the date of judgment herein.

Count II

1. For its second count against the defendant the plaintiff adopts and restates as is recited heretofore all the allegations and matters contained in paragraphs 1, 2, 3 and 4 of Count I of this petition, and further states:

2. That at the said rates on file with the Public Service Commission, the Kansas City Light & Power Company furnished to defendant for heating the buildings set out in paragraph 5 of Count I of this petition, from the 1st day of November, 1917, to the 30th day of November, 1917, steam for heating of the value, according to said rates, of seven hundred sixty-eight & 26/100 ($768.26) dollars; that the delinquent date for the payment of said bill was December 15, 1917, said bill having been duly rendered to the defendant by the Kansas City Light & Power Company on or before December 5, 1917; that on December 14, 1917, the defendant paid on account of said bill the sum of four hundred ten & 23/100 ($410.23) dollars, leaving a balance due and unpaid upon said bill of three hundred fifty-eight & 03/100 ($358.03) dollars, which defendant refused to pay and still refuses to pay.

[fol. 30-6] 3. Wherefore, plaintiff prays judgment against the defendant on the second count for the sum of three hundred fifty-eight & 03/100 ($358.03) dollars with interest thereon from December 15, 1917, until the date of judgment herein.

Count III

1. For its third count against the defendant, the plaintiff adopts and reiterates as is recited heretofore all the allegations and matters contained in paragraphs 1, 2, 3 and 4 of Count I of this petition, and further states:

2. That at the said rates on file with the Public Service Commission, the Kansas City Light & Power Company furnished to defendant for heating the buildings set out in paragraph 5 of Count I of this petition, from the 1st day of December, 1917, to the 31st day of December, 1917, steam for heating of the value, according to said rates, of one thousand two hundred and seven & 45/100 ($1,207.45) dollars; that the delinquent date for the payment of said bill was January 15, 1918, said bill having been duly rendered

to the defendant by the Kansas City Light & Power Company on or before January 5, 1918; that on January 15, 1918, the defendant paid on account of said bill the sum of six hundred eighty-eight & 61/100 ($688.61) dollars, leaving a balance due and unpaid upon said bill of five hundred eighteen & 84/100 ($518.84) dollars, which defendant refused to pay and still refuses to pay.

3. Wherefore, plaintiff prays judgment against the defendant on the third count for the sum of five hundred [fol. 30-7] eighteen & 84/100 ($518.84) dollars with interest thereon from January 15, 1918.

Count IV

1. For the fourth count against the defendant, the plaintiff adopts and reiterates as is recited heretofore all the allegations and matters contained in paragraphs 1, 2, 3 and 4 of Count I of this petition, and further states:

2. That at the said rates on file with the Public Service Commission, the Kansas City Light & Power Company furnished to defendant for heating the buildings set out in paragraph 5 of Count I of this petition, from the 1st day of January, 1918, to the 31st day of January, 1918, steam for heating of the value, according to said rates, of one thousand three hundred sixteen & 09/100 ($1,316.09) dollars; that the delinquent date for the payment of said bill was February 15, 1918, said bill having been duly rendered to the defendant by the Kansas City Light & Power Company on or before February 5, 1918; that on February 12, 1918, the defendant paid on account of said bill the sum of seven hundred fifty-five & 23/100 ($755.23) dollars, leaving a balance due and unpaid upon said bill of five hundred sixty & 86/100 ($560.86) dollars, which defendant refused to pay and still refuses to pay.

3. Wherefore, plaintiff prays judgment against the defendant on the fourth count for the sum of five hundred sixty & 86/100 ($560.86) dollars, with interest thereon from February 15, 1918, until the date of judgment herein.

[fol. 30-8] Count V

1. For its fifth count against the defendant, the plaintiff adopts and reiterates as is recited heretofore all the allega-

tions and matters contained in paragraphs 1, 2, 3 and 4 of Count I of this petition, and further states:

2. That at the said rates on file with the Public Service Commission, the Kansas City Light & Power Company furnished to defendant for heating the buildings set out in paragraph 5 of Count I of this petition, from the 1st day of February, 1918, to the 28th day of February, 1918, steam for heating of the value, according to said rates, of one thousand one hundred forty-one & 04/100 ($1,141.04) dollars; that the delinquent date for the payment of said bill was March 15, 1918, said bill having been duly rendered to the defendant by the Kansas City Light & Power Company on or before March 5, 1918; that on March 15, 1918, the defendant paid on account of said bill the sum of six hundred forty-five & 67/100 ($645.67) dollars, leaving a balance due and unpaid upon said bill of four hundred ninety-five & 37/100 ($495.37) dollars, which defendant refused to pay and still refuses to pay.

3. Wherefore, plaintiff prays judgment against the defendant on the fifth count for the sum of four hundred ninety-five & 37/100 ($495.37) dollars, with interest thereon from March 15, 1918, until the date of judgment herein.

[fol. 30-9] Count VI

1. For its sixth count against the defendant, the plaintiff adopts and reiterates as is recited heretofore all the allegations and matters contained in paragraphs 1, 2 and 3 of Count I of this petition, and further states:

2. That on or prior to March 1st, 1918, the Public Service Commission of the State of Missouri fixed the rates to be charged on and after March 1, 1918, by the Kansas City Light & Power Company to its customers for heat, as follows:

"Steam Heating Service"

First 20,000 lbs. of condensation per mo. $0.85 per 1000 lbs.
Next 180,000 " " " " " .70 " " "
Next 500,000 " " " " " .60 " " "
All in excess of 700,000 lbs. of condensation per month, 50c per thousand lbs.

3. Plaintiff further states that at the rates fixed by the Public Service Commission, the Kansas City Light & Power Company furnished to defendant for heating the buildings

at the southwest corner of Tenth and Oak Streets, northwest corner of Tenth and McGee Streets, No. 1008 Oak Street, and at the southeast corner of Tenth and McGee Streets, in Kansas City, Missouri, from the 1st day of March, 1918, to the 31st day of March, 1918, steam for heating of the value, according to said rates, of five hundred and five & 92/100 ($505.92) dollars; that the delinquent date for the payment of said bill was April 15, 1918, said bill having been duly rendered to the defendant by the Kansas City Light & Power Company on or before April 5, 1918; that on April 11, 1918, the defendant paid on account of said bill the sum of three hundred sixteen & 48/100 ($316.48) dollars, leaving a balance due and unpaid upon [fol. 30-10] said bill of one hundred eighty-nine & 44/100 ($189.44) dollars, which defendant refused to pay and still refuses to pay.

4. Wherefore, plaintiff prays judgment against the defendant on the sixth count for the sum of one hundred eighty-nine & 44/100 ($189.44) dollars, with interest thereon from April 15, 1918, until the date of judgment herein.

Count VII

1. For its seventh count against the defendant, the plaintiff adopts and reiterates as is recited heretofore all the allegations and matters contained in paragraphs 1, 2 and 3 of Count I and paragraph 2 of Count VI of this petition and further states:

2. That at the said rates fixed by the Public Service Commission, the Kansas City Light & Power Company furnished to defendant for heating the buildings set out in paragraph 3 of Count VI of this petition, from the 1st day of April, 1918, to the 30th day of April, 1918, steam for heating of the value, according to said rates, of four hundred sixty-seven & 26/100 ($467.26) dollars; that the delinquent date for the payment of said bill was May 15, 1918, said bill having been duly rendered to the defendant by the Kansas City Light & Power Company on or before May 5, 1918; that on May 11, 1918, the defendant paid on account of said bill the sum of two hundred eighty-seven & 18/100 ($287.18) dollars, leaving a balance due and unpaid upon said bill of one hundred eighty & 08/100 ($180.08) dollars, which defendant refused to pay and still refuses to pay.

[fol. 30-11] 3. Wherefore, plaintiff prays judgment against the defendant on the seventh count for the sum of one hundred eighty & 08/100 ($180.08) dollars, with interest thereon from May 15, 1918, until the date of judgment herein.

Count VIII

1. For its eighth count against the defendant, the plaintiff adopts and reiterates as is recited heretofore all the allegations and matters contained in paragraphs 1, 2 and 3 of Count I, and paragraph 2 of Count VI of this petition and further states:

2. That at the said rates fixed by the Public Service Commission, the Kansas City Light & Power Company furnished to defendant for heating the buildings set out in paragraph 3 of Count VI of this petition, from the 1st day of May, 1918, to the 31st day of May, 1918, steam for heating of the value, according to said rates, of one hundred eighty-eight & 57/100 ($188.57) dollars; that the delinquent date for the payment of said bill was June 16, 1918, said bill having been duly rendered to the defendant by the Kansas City Light & Power Company on or before June 5, 1918; that on June 17, 1918, the defendant paid on account of said bill the sum of one hundred and five & 31/100 ($105.31) dollars, leaving a balance due and unpaid upon said bill of eighty-three & 26/100 ($83.26) dollars, which defendant refused to pay and still refuses to pay.

3. Wherefore, plaintiff prays judgment against the defendant on the eighth count for the sum of eighty-three & 26/100 ($83.26) dollars, with interest thereon from June [fol. 30-12] 15, 1918, until the date of judgment herein.

Count IX

1. For its ninth count against the defendant, the plaintiff adopts and reiterates as is recited heretofore all the allegations and matters contained in paragraphs 1, 2 and 3 of Count I and paragraph 2 of Count VI of this petition and further states:

2. That at the said rates fixed by the Public Service Commission, the Kansas City Light & Power Company furnished to defendant for heating the buildings set out in paragraph 3 of Count VI of this petition, from the 1st day of June,

1918, to the 30th day of June, 1918, steam for heating of the value, according to said rates, of eighty-seven & 50/100 ($87.50) dollars; that the delinquent date for the payment of said bill was July 15, 1918, said bill having been duly rendered to the defendant by the Kansas City Light & Power Company on or before July 5, 1918; that on July 15, 1918, the defendant paid on account of said bill the sum of forty-five & 83/100 ($45.83) dollars, leaving a balance due and unpaid upon said bill of forty-one & 67/100 ($41.67) dollars, which defendant refused to pay and still refuses to pay.

3. Wherefore, plaintiff prays judgment against the defendant on the ninth count for the sum of forty-one & 67/100 ($41.67) dollars, with interest thereon from July 15, 1918, until the date of judgment herein.

[fol. 30-13] Count X

1. For its tenth count against the defendant, the plaintiff adopts and reiterates as is recited heretofore all the allegations and matters contained in paragraphs 1, 2 and 3 of Count I and paragraph 2 of Count VI of this petition and further states:

2. That at the said rates fixed by the Public Service Commission, the Kansas City Light & Power Company furnished to defendant for heating the buildings set out in paragraph 3 of Count VI of this petition, from the 1st day of July, 1918, to the 31st day of July, 1918, steam for heating of the value, according to said rates, of ninety-two & 82/100 ($92.82) dollars; that the delinquent date for the payment of said bill was August 15, 1918, said bill having been duly rendered to the defendant by the Kansas City Light & Power Company on or before August 5, 1918; that on August 13, 1918, the defendant paid o naccount of said bill the sum of forty-eight & 71/100 ($48.71) dollars, leaving a balance due and unpaid upon said bill of forty-four & 11/100 ($44.11) dollars, which defendant refused to pay and still refuses to pay.

3. Wherefore, plaintiff prays judgment against the defendant on the tenth count for the sum of forty-four & 11/100 ($44.11) dollars with interest thereon from August 15, 1918, until the date of judgment herein.

[fol. 30-14] Count XI

1. For its eleventh count against the defendant, the plaintiff adopts and reiterates as is recited heretofore all the allegations and matters contained in paragraphs 1, 2 and 3 of Count I and paragraph 2 of Count VI of this petition and further states:

2. That at the said rates fixed by the Public Service Commission, the Kansas City Light & Power Company furnished to defendant for heating the buildings set out in paragraph 3 of Count VI of this petition, from the 1st day of August, 1918, to the 31st day of August, 1918, steam for heating of the value, according to said rates, of ninety-six & 42/100 ($96.42) dollars; that the delinquent date for the payment of said bill was September 15, 1918, said bill having been duly rendered to the defendant by the Kansas City Light & Power Company on or before September 5, 1918; that on September 13, 1918, the defendant paid on account of said bill the sum of fifty & 66/100 ($50.66) dollars, leaving a balance due and unpaid upon said bill of forty-five & 76/100 ($45.76) dollars, which defendant refused to pay and still refuses to pay.

3. Wherefore, plaintiff prays judgment against the defendant on the eleventh count for the sum of forty-five & 76/100 ($45.76) dollars, with interest thereon from August 15, 1918, until the date of judgment herein.

[fol. 30-15] Answer

The answer to the second amended petition, duly filed in the Circuit Court of Jackson County, Missouri, at Kansas City, upon which this case was tried, is in words and figures, as follows:

Answer to Second Amended Petition

Now comes defendant and for its answer to plaintiff's second amended petition herein, and to each count thereof, denies each and every allegation in said petition, and each count thereof, contained.

For its further answer to said second amended petition, and to each count thereof, defendant states that whatever

heating service was furnished to defendant by plaintiff, or its predecessors, the Kansas City Light & Power Company and Kansas City Heating Company, between October 1, 1917, and September 1, 1918, was done under and by virtue of a written contract between defendant and Kansas City Heating Company, dated February 27, 1908, whereby said Heating Company undertook and agreed to furnish steam heating service to defendant for a period of five years, beginning September 1, 1908, and ending August 31, 1913, with the proviso in said contract that this defendant should have the option, by giving written notice to said Light & Power Company, its successors or assigns, on or before June 2, 1913, of extending the terms of said contract for a period of five years, and that such option was exercised by defendant and written notice, extending said contract for a period of five years, was given to said Heating Com-
[fol. 30-16] pany, by defendant, on or about May 29, 1913. Defendant further states that in said contract plaintiff's predecessor, the Kansas City Heating Company, undertook and agreed to furnish heating service to defendant at the following rates, to-wit: For the first fifty thousand (50,000) pounds of condensation per season, at sixty-five cents ($0.65) per one thousand (1000) pounds; for the second fifty thousand (50,000) pounds of condensation per season, at fifty-five ($0.55) cents per one thousand (1000) pounds, and all condensation in excess of one hundred thousand (100,000) pounds per season, at forty cents ($0.40) per one thousand (1000) pounds; bills for same to be rendered to defendant at the end of each calendar month and defendant to be allowed a discount of ten per cent (10%) of the amount of such bills if the same be paid on or before the tenth day of the month after such bills were rendered. Defendant further states that the Kansas City Heating Company did render heating service to defendant between October 1, 1917, and September 1, 1918, and for all such service defendant paid therefor promptly, according to the terms of said contract, and that plaintiff, or its predecessor, said Heating Company, has been fully paid for all heating service rendered to defendant; and defendant states that to permit plaintiff to recover any further sum from defendant for heating service, between the dates aforesaid, and to permit plaintiff to impose upon defendant the rates for steam heating service set forth in plaintiff's second amended petition herein, and particularly in Count I and Count VI

thereof, would be in violation of Section 10 of Article I of the Constitution of the United States, which provides [fol. 30-17] that no state shall pass any law impairing the obligation of contracts. And defendant further states that to permit plaintiff to recover any further sums from defendant outside of and in excess of the sums required to be paid by defendant under and by virtue of the written contract aforesaid, between defendant and said Heating Company, would be the taking of defendant's property and property rights in said contract without compensation and without due process of law, in violation of Section I of Article 14 of the amendments to the Constitution of the United States, and would be denying to defendant the equal protection of the law, in violation of Section I of Article 14 of the amendments to the Constitution of the United States.

Further answering said second amended petition, defendant denies that prior to August 1, 1917, the Public Service Commission of the State of Missouri fixed a schedule of rates for steam heat service, as set forth in Count I of the amended petition herein, and defendant denies that said last mentioned schedule of rates for steam heat service was ever approved by such Public Service Commission, or that the same was ever a legal schedule of rates, but, on the contrary, defendant states that such schedule of rates, after being filed by plaintiff herein, or its predecessor, was, upon a protest being made thereto by the City of Kansas City and heat consumers, after a hearing thereon, as provided by law, before said Commission, found and declared by said Public Service Commission of Missouri to be illegal, unreasonable and excessive, and that such ruling and decision of the Commission became and was a final decision, [fol. 30-18] and conclusive upon plaintiff, and that said decision of the Commission is found and reported in Volume 5, Mo. P. S. C. Reports, pp. 664 and following.

Further answering, defendant states that the schedule of steam heating rates set forth in Count VI of the amended petition herein was fixed by the Public Service Commission without any notice to or any hearing of this defendant, and without any consideration or finding by said Commission as to the reasonableness or unreasonableness of the written contract, hereinbefore referred to, between defendant and Kansas City Heating Company, and defendant says that to make either of said above named schedule of rates applicable to this defendant, during the term of this said

written contract, or during the times set forth in the amended petition herein, would be impairing the obligations of said contract and would be denying to defendant the equal protection of the law, and the taking of defendant's property without due process of law, in violation of the provisions of the Constitution of the United States above mentioned.

Wherefore, having fully answered, defendant prays to be discharged hence with its costs.

JUDGMENT

On the issues theretofore joined, trial was had and judgment was entered by the court on the 27th day of August, 1932, the same being the sixtieth day of the May term, 1932, of said court, which said judgment is in words and figures as follows:

[fol. 30-19] "This cause coming regularly on to be heard, the parties hereto appearing by their attorneys, and the parties hereto having waived a jury herein, and submitted the issues to the court, and the court having heard and considered all of the evidence in the case, and having considered and passed upon the declarations of law requested by the defendant, and having heard the arguments of counsel, and being fully advised in the premises, finds the issues in favor of the defendant upon Counts 1, 2, 3, 4 and 5 of the second amended petition in this cause, upon which said second amended petition the issues were made up herein, and finds the issues in favor of plaintiff upon Counts 6, 7, 8, 9, 10 and 11 of said second amended petition.

Wherefore, It is ordered and adjudged by the court that the plaintiff have and recover nothing upon Counts 1, 2, 3, 4 and 5 of the second amended petition, and that judgment be, and it is hereby adjudged, for the defendant upon said Counts 1, 2, 3, 4 and 5 of said second amended petition.

It is further ordered and adjudged by the court that the plaintiff have and recover of and from the defendant as follows:

Upon Count 6 of the second amended petition the sum of $189.44 plus interest thereon to the date of this judgment in the sum of $163.36, or the total sum including principal and interest of $352.80 upon said Count 6.

Upon Count 7 of the second amended petition the sum of $180.08 plus interest thereon to the date of this judgment [fols. 30-20–30-22] in the sum of $154.39, or the total sum including principal and interest of $334.47 upon said Count 7.

Upon Count 8 of the second amended petition the sum of $83.26 plus interest thereon to the date of this judgment in the sum of $70.94, or the total sum including principal and interest of $154.20 upon said Count 8.

Upon Count 9 of the second amended petition the sum of $41.67 plus interest thereon to the date of this judgment in the sum of $35.30, or the total sum including principal and interest of $76.97 upon said Count 9.

Upon Count 10 of the second amended petition the sum of $44.11 plus interest thereon to the date of this judgment in the sum of $37.14, or the total sum including principal and interest of $81.25 upon said Count 10.

Upon Count 11 of the second amended petition the sum of $45.76 plus interest thereon to the date of this judgment in the sum of $38.33, or the total sum including principal and interest of $84.09 upon said Count 11.

That the plaintiff have interest at the rate of six per centum per annum from the date of this judgment upon the aggregate amount of $1083.78, and that plaintiff have execution for the aggregate amount of $1083.78 and interest from the date hereof, and for its costs herein."

MOTIONS FOR NEW TRIAL

The record shows that, in due and proper time, both plaintiff and defendant duly filed herein their respective Motions for a New Trial, hereinafter set out; and that both of said Motions were overruled by the Court on January 7, 1933, during the November, 1932, Term of said Court.

[fol. 30-23] APPLICATION AND AFFIDAVIT FOR APPEAL OF DEFENDANT-APPELLANT AND ORDER GRANTING APPEAL

And thereafter, to-wit: On the 7th day of January, 1933, the same being the 45th day of the November term, 1932, of said court, said term being the same term within which de-

fendant's motion for new trial was overruled, defendant's application and affidavit for appeal was filed in the Circuit Court of Jackson County, Missouri, at Kansas City, and was taken up and examined by the court and found to be in proper form; and having been seen, heard and considered by the court, was sustained and an appeal was allowed by the court to the Supreme Court of the State of Missouri. Said order appears in the records of the Circuit Court of Jackson County, Missouri, at Kansas City. The said application and affidavit for appeal is in words and figures as follows:

"Now comes defendant, Midland Realty Company, and prays the court to grant it an appeal in the above entitled cause to the Supreme Court of Missouri from the judgment rendered and entered herein upon Counts 6 to 11, inclusive, and each of them, of plaintiff's second amended petition.

Scarritt, Jones and North, Attorneys for Defendant.

STATE OF MISSOURI,
County of Jackson, ss:

Elliott H. Jones, being first duly sworn, and upon his oath states that he is the attorney and agent for the Midland Realty Company, defendant and appellant herein, and being hereto duly authorized makes this affidavit in its be- [fol. 30-24] half, and further states that such appeal is not made for vexation or delay but because affiant and said appellant believe that the said appellant is aggrieved by the judgment and decision of the court herein upon Counts 6 to 11, inclusive, of the second amended petition herein.

(Signed) Elliott H. Jones.

Subscribed and sworn to before me this 7th day of January, 1933. (Signed) Lynn G. Buford, Clerk of the Circuit Court of Jackson County, Missouri, by J. A. Shannon, Deputy. (Seal.)"

The filing mark of the clerk of the Circuit Court of Jackson County, Missouri, at Kansas City, appearing on the back of said application and affidavit for appeal is in words and figures as follows:

"Filed January 7, 1933, Lynn G. Buford, Clerk, by J. A. Shannon, Deputy."

APPLICATION AND AFFIDAVIT FOR APPEAL OF PLAINTIFF-APPELLANT AND ORDER GRANTING APPEAL

And thereafter, to-wit: on the 7th day of January, 1933, the same being the 45th day of the November term, 1932, of said court, said term being the same term within which the plaintiff's motion for new trial was overruled, the plaintiff's application and affidavit for appeal was filed in the Circuit Court of Jackson County, Missouri, at Kansas City, and was taken up and examined by the court and found to be in proper form; and having been seen, heard and considered [fol. 30-25] by the court, was sustained and an appeal was allowed by the court to the Supreme Court of the State of Missouri. Said order appears of record in the Circuit Court of Jackson County, Missouri, at Kansas City. Said application and affidavit for appeal is in words and figures as follows:

APPLICATION AND AFFIDAVIT FOR APPEAL

"STATE OF MISSOURI,
County of Jackson, ss:

The Kansas City Power & Light Company prays the court to grant to it an appeal in the above entitled cause, and for reason therefor states:

That the verdict and judgment returned and rendered herein upon Counts I to V, both inclusive, and the refusal of the court to grant to plaintiff a new trial upon said counts in this cause is oppressive, unjust and erroneous.

And Ludwick Graves, being first duly sworn, upon his oath states that he is attorney and agent for the Kansas City Power & Light Company, the above named appellant, and makes this affidavit for and in its behalf, and states that such appeal is not made for vexation or delay but because affiant believes that the appellant is aggrieved by the judgment and decision of the court upon Counts I to V, both inclusive.

(Signed) Ludwick Graves.

Subscribed and sworn to before me this 7th day of January, 1933. (Signed) Lynn G. Buford, Clerk, by J. A. Shannon. (Seal.)"

The filing mark of the clerk of the Circuit Court of Jackson County, Missouri, at Kansas City, appearing on the [fols. 30-26 & 30-27] back of said application and affidavit for appeal is in words and figures as follows:

"Filed January 7, 1933, Lynn G. Buford, Clerk, by J. A. Shannon, Deputy."

CERTIFICATE OF JUDGMENT AND ORDER GRANTING APPEALS

On the 13th day of January, 1933, both appellants filed in this court a certified copy of the record entry of the judgment appealed from, showing the date and day of the term, month and year upon which the same was rendered, together with the orders granting the appeals, as prescribed by Section 1028, R. S. Mo. 1929, and prescribed by the rules of the Supreme Court of Missouri, and of which this court will take judicial notice, said certificate evidencing the filing of the motions for new trial, orders overruling the same, the judgment and the granting of the appeals to this court.

ORDER FILING BILL OF EXCEPTIONS

Thereafter, to-wit: On the 6th day of May, 1933, the same being the 47th day of the March, 1933, term of said court, the joint bill of exceptions on behalf of plaintiff and defendant was duly and timely filed by the appellants in the office of the clerk of the Circuit Court of Jackson County, Missouri, at Kansas City, and on said day the court allowed, signed, filed and ordered the said bill of exceptions to be made a part of the record herein.

[fol. 30-28] **Joint Bill of Exceptions on Behalf of Plaintiff-Appellant and Defendant-Appellant**

OPENING STATEMENTS AND ADMISSIONS

Mr. Graves: This is a case involving the question of whether or not there are any moneys due the Kansas City Power & Light Company, as the successor of other companies, for the difference between the steam-heating rate

specified in a certain contract by and between defendant company and the predecessor companies of the Kansas City Power & Light Company and the Midland Realty Company, and the rates filed under the law with the Public Service Commission of the State of Missouri; that, briefly, is this case.

Prior to the enactment in the State of Missouri of the Public Service Commission law—correct me, now, if I make a misstatement—we had separate contracts with the different buildings in Kansas City for the supplying of steam heat, one of which was with the Midland Realty Company, which had a contract with the predecessor company of the light company, and that was extended in 1913—wasn't it?

Mr. Jones: Yes.

Mr. Graves: For an additional five years—or twelve years; the original contract was five years prior to that. This was extended before the Public Service Commission law, which carried it up until the year 1917 or 1918—1918—that contract. In 1917, the Kansas City Light & Power Company, which is a predecessor company, filed with the [fol. 30-29] Public Service Commission of the State of Missouri a general steam-heating rate, applicable to all of its customers, and that remained on file for a period of thirty days, under the law; no protest having been made under the law, it became effective. After that; upon application of a number of consumers of steam heat, that rate was attacked by direct proceeding in the Public Service Commission, and it was reduced—not down to what the contract rate was, but down to a figure less than the final rate. After that, another rate, much higher than either the contract rate or the first rate filed in 1917, was filed by the Kansas City Light & Power Company, and that rate was finally sustained by the Public Service Commission, and sustained by the Supreme Court.

Now, the question is solely—as I understand it, there are only two rates involved in this case; the third rate isn't involved in this case; it will be introduced in evidence only on the question of the reasonableness of the first rate and second rate. Mr. Jones' company, the Midland Realty Company, refused to pay the filed rate, and did pay, as we admit, on account, under the terms of their contract, up until the contract went out of existence, and then they paid the final rates after that. This suit is for the difference

between the contract rate, which they still say they are under—and we say the filed rate, and the only one; that is the sole issue as I see it.

Mr. Jones: I think that is just about the case, Your Honor. To make it a little more clear: As Mr. Graves stated, this contract was made, and the extension thereof, both, prior to the passage of the Public Service Commission Act. I don't [fol. 30-30] know that they lay particular stress on that fact, or whether it makes a great deal of difference.

Our position in the matter has been this: That the mere passage of the Public Service Commission Act establishing the Commission did not in and of itself destroy, annual or wipe out existing contracts with a public utility. Then, as Mr. Graves stated, some time later this company or its predecessor—there is no question about the succession of the companies—simply filed—sent down a rate and filed it; there was no action of the Public Service Commission thereon, in any manner or shape; it simply remained on file thirty days, without any action thereon, and they claim it went into effect, under the statute—that the rate should go in after thirty days; that there was no consideration, hearing or action taken by the Public Service Commission whatsoever.

Our position is that the merge passage of the Public Service Commission Act did not, in and of itself, wipe out any contract. We are perfectly cognizant of the law and the decisions that a contract with a public utility is subject to the police power of the state, and subject to be set aside if for the public good; but it doesn't follow that by the mere enactment of the statute there was accomplished the annulment of any contract.

Our further position is that the mere filing of a rate by a public utility, after the passage of an act, also does not serve to annul a contract. The passage of the Public Service Commission Act, as we call it, simply was a first step; it was a claim—an assertion of a claim of a right which up to that time they didn't have, because up to that time the [fol. 30-31] legislature hadn't acted to fix a rate, just a mere step empowering the state, through its proper bodies, to fix a rate; that the mere passage or filing of a rate without any hearing or action of the Public Service Commission thereon, did not set aside the contract. That affects about two-thirds or three-fourths of this case.

At that time—I might add there—I guess Mr. Graves has made that plain—that rate that was filed was attacked by the city, and upon hearing it was held to be unreasonable, and was set aside by the Commission. Then the company, a little later, filed an application for the Public Service Commission to hear the matter of and with reference to both electrical current and steam-heating rates, and to put in a rate which was reasonable. This passed through Your Honor here; if you will remember, Your Honor held this court didn't have any jurisdiction; we went to the Supreme Court on mandamus, asserting that the Circuit Court of Jackson County did have jurisdiction, and it went up before Judge Hall, at Independence, who set aside this last action of the Public Service Commission; they appealed it to the Supreme Court. That involves between one-third and one-quarter of the counts sued on.

This company, the Midland Realty Company, was not at any time a party to any of those actions; its contract was never brought into question directly; so we say that, while the state may have had the power on a hearing to annul their contract, it never has done it; so the company paid, in accordance with the contract, up to the full term of the contract, and continued to pay according to schedule after the time of the contract; they now have brought suit for the difference between what they have been paid, as they [fols. 30-32 & 30-33] concede, according to the contract rate and that charged, first under the schedule which was merely filed by the company, without any action of the Public Service Commission, which filed schedule was later set aside; and later, under the rate put into effect by the Public Service Commission at a hearing. I know, of course, I am up against a very much different proposition under the latter part of the petition than I am the first; but even then I am still working under the contract.

[fol. 30-34] PLAINTIFF'S TESTIMONY

Whereupon, the plaintiff, to sustain the issues in his behalf, offered testimony, oral and documentary, and made admissions as follows, to-wit:

Mr. Graves: Mr. Jones and I, I think, have agreed that this is to be tried on the second amended petition; that the

first, second and third paragraphs of Count 1, which also apply to each and every other count in the petition, are admitted. These allegations are that the Kansas City Power & Light Company says it is a corporation, and that it is engaged in the production and distribution of electricity to Kansas City—a public utility under the law and subject to the jurisdiction of the Public Service Commission; that it is the successor of the Kansas City Light & Power Company and the Kansas City Heating Company, and is the owner and assignee of all choses in action, rights and privileges, property and contracts of those two predecessor companies; the second paragraph alleges the Light & Power Company's corporate existence as being the same; and the third paragraph, that the defendant, which is the Midland Realty Company, is a corporation. Can all three of those be admitted?

Mr. Jones: Yes; the defendant will admit all the facts in Counts 1, 2 and 3 of the second amended petition.

[fol. 30-35] Mr. Graves: Which is applicable to all counts?

Mr. Jones: Yes, sir.

Mr. Graves: If Your Honor please, I would like to introduce some general evidence that is applicable to all three counts; I will offer in evidence as to all counts a certified copy, certified by the secretary of the Public Service Commission of the State of Missouri, of the rate filed June 19, 1917, effective August 1st, 1917.

Mr. Jones: The petition shows June 28th.

Mr. Graves: Well, it is effective August 1st; it should be prior to August 1st, 1917, which shows that it remained in effect until cancelled March 1, 1918, and also the rate—now, I will state for the record that this first rate is applicable to Counts 1, 2, 3, 4 and 5; there is also here in this certified copy—the date of issue was February 11, 1918, and it was filed, effective March 1, 1918; this was filed as per order of the Commission, after a hearing upon the direct attack on the first rate effective August 1, 1917; those are the two rates that are involved.

The Court: That first rate, as I understand, was disapproved by the Commission?

Mr. Graves: Later; no; it was filed and lay there for more than thirty days, and under the statute it became effective, and after the effective date certain heating customers of the Kansas City Light & Power Company attacked it by direct attack before the Commission.

Mr. Jones: This first schedule of rates becoming effective August 1, 1917, was merely filed by the company on June 17th, and under your claim merely went into effect by [fols. 30-36–30-42] reason of the fact that it remained on file without protest or hearing, or anything, for more than thirty days.

Mr. Graves: Yes—or over the period required by the statute, which is thirty days. The Public Service Commission, of its own motion, didn't set aside this filed rate of August 1, 1917, and no one protested the filing of that rate.

Mr. Jones: And the Public Service Commission didn't make any direct order with respect to it?

Mr. Graves: That is correct. I want this marked—and all of these rates are certified together, under date of the 26th of January, 1929; and I will have it identified as plaintiff's Exhibit 1, and I offer the same in evidence, together with the certificate.

(Which said instrument handed to the reporter was marked for identification as "Plaintiff's Exhibit 1, EFM," which being offered in evidence, is in words and figures as follows:)

RECITAL AS TO PLAINTIFF'S EXHIBIT 1

Said schedules are not here set forth since the substance of the first mentioned schedule, filed June 19, 1917, is correctly set forth in Count I of the petition, ante, and the substance of the second schedule mentioned, dated February 11, 1918, effective March 1, 1918, is correctly set forth in Count VI of the petition herein, ante.

[fol. 30-43] OFFERS IN EVIDENCE

Mr. Graves: I introduce in evidence consolidated Case Nos. 299,601 and 603, of the Public Service Commission, together with the order or orders and findings made, appearing at page 20 and following pages—it is pages 20 to 124, inclusive, of Volume 5 of the Official Reports, Public Service Commission Reports, Volume 5.

Mr. Graves: I now offer and introduce in evidence Case No. 1353, decided February 11, 1918, entitled "In the Mat-

ter of the Complaint of Kansas City v. Kansas City Light & Power Company, Mary B. Case, et al., Interveners," [fols. 30-44 & 30-45] decided February 11, 1918, and all orders, findings and reports contained therein, which appears at pages 664, same volume, to 683, inclusive, Volume 5, Public Service Commission Reports of Missouri.

Mr. Graves: I introduce in evidence Case No. 1615, of the Public Service Commission of the State of Missouri, and its decision thereon, entitled "In the Matter of Application of Kansas City Light & Power Company for increase in rates for electrical current and steam heat, City of Kansas City, Missouri, Albert Marty Estate et al., Mary B. Case et al., and Cement Company, Interveners," which was decided August 13, 1918, and appears on pages 223 to 301, inclusive, of Volume 8, Public Service Commission Reports of Missouri—the official reports; they may be received in evidence, Your Honor?

The Court: Yes.

AGREEMENT AS TO CERTAIN EVIDENCE

It is agreed that the three above mentioned decisions and findings of said Public Service Commission may be considered in evidence to the same effect as if fully set forth in the Record, by mere reference to the books and pages, as above stated, of the Public Service Commission Reports of Missouri, where said decisions are found reported.

[fol. 30-46] COLLOQUY

Mr. Graves: Now, I am ready to make formal proof of the amounts, and I intend to give full credit to everything paid under your contracts.

Mr. Jones: I don't think that is necessary—we will admit those.

Mr. Graves: We can admit the figures; I have it in exhibit form.

[fol. 30-47] Mr. Jones: I don't think we will need it; they agree with the petition, don't they?

Mr. Graves: Yes, except on one point, where I missed a day, this is correct; there is the statement of your account.

Mr. Jones: Well, change your petition by interlineation and we will agree that the amounts stated in the second amended petition, which we paid, are exactly what we should have paid under the contract.

Mr. Graves: That is correct.

Mr. Jones: And that the amounts brought out in each count are the correct difference between the schedule rates as filed and the contract rates.

[fol. 30-48] Whereupon, the plaintiff rested its case.

[fol. 30-49] DEFENDANT'S TESTIMONY

Whereupon, the defendant, to sustain the issues in his behalf, offered testimony, oral and documentary, and made admissions as follows, to-wit:

Mr. Jones: Do you want me to put in that contract?

Mr. Graves: You just put it in; if you have it, we will admit it.

Mr. Jones: The defendant offers in evidence contract for steam heating rates referred to, dated February 27, 1908, between the Kansas City Heating Company and this defendant, Midland Realty Company as Defendant's Exhibit 1.

(Which said instrument handed to the reporter was marked for identification as "Defendant's Exhibit 1, EFM," which being offered in evidence, is in words and figures as follows:)

DEFENDANT'S EXHIBIT 1, EFM

"Steam Heat Agreement

Agreement entered into this 27th day of Feb. 1908 between the Kansas City Heating Company, hereinafter called the Company and the Midland Realty Company, hereinafter called the Consumer, both being corporations of Kansas City, Jackson County, Missouri.

Witnesseth:

That Whereas the Company is engaged in the business in Kansas City, Missouri, of manufacturing steam for the purpose of heating the buildings in certain localities and

Consumer now has, owns or controls two buildings, one [fol. 30-50] located on S. E. Corner 10th and McGee Streets, (which stands in the name of Laura B. Minor), and one on the S. W. corner of 10th and Oak Streets, and has designed and contemplates erecting two other buildings, one to be located on N. W. corner of 10th and McGee Streets and one to be located at 1008 Oak St., and in consideration of the Company extending its steam service pipe up to and from three (3) to five (5) feet inside of the ou-side wall of each of said buildings, ready to connect with the steam pipes of the Consumers therein, the Consumer agrees to use the Company's steam for heating said buildings (unless said buildings should pass out of their possession or control by bona fide sale or be destroyed by fire) for and during a period of five (5) years beginning 1st day of Sept. 1908 and ending 31st day of Aug. 1913.

The Consumer agrees to install and maintain sufficient radiation to heat the above mentioned buildings to 70 degrees Fahrenheit inside with the outside temperature ten degrees below zero, Fahrenheit, and must have piping of sufficient capacity to fill all radiation under these conditions with steam at a pressure of one pound per square inch at entrance valve and further agrees to equip all of the above mentioned buildings with approved steam traps of sufficient capacity to properly drain condensation from the heating systems of the buildings without any loss of steam and to equip all radiators with automatic air valves of a make satisfactory to the Company and to equip each building with an economy coil, surface of which shall equal one-fifth (1/5) of the entire radiating surface of the building.

[fol. 30-51] The Consumer agrees while the Company performs its part of this agreement to take and use the steam of the Company exclusively for the purpose of heating said buildings during the term aforesaid (except the building at the S. E. Corner of 10th and McGee Streets, as to which building the Consumer or Consumer's tenants have the option to take steam or not just as they choose on the terms stated herein) and agree to pay for all steam used by it according to the number of pounds of condensation per heating season, that is to say, for the first fifty thousand (50,000) pounds of condensation per season at sixty-five (65) cents per one thousand (1,000) pounds; for

the second fifty thousand (50,000) pounds of condensation per season at fifty-five (55) cents per one thousand (1,000) pounds and all condensation in excess of one hundred thousand (100,000) pounds per season at forty (40) cents per one thousand (1,000) pounds, it being understood that the above rates apply to the total amount of steam used in all said buildings the same as if there were only one meter, instead of separate meters in each building, though seperate monthly bills are to be rendered on each meter, as contemplated in this contract. The amount of condensation shall be determined by the meter registration. Correct statement of account shall be rendered by the Company to the Consumer at the end of each calendar month and it is expressly agreed that if said bills are paid by the Consumer on or before the tenth (10) day after such bills are rendered, they shall be allowed a discount of ten (10) per cent of the amount of such bills.

[fol. 30-52] The Company expressly agrees that the cost of heating said buildings shall not during any heating season exceed twenty-four (24) cents per square foot of radiating surface.

The meter or meters used in these buildings for the measuring of the condensed steam shall be of the standard type manufactured by the American District Steam Co. It is expressly agreed that the Consumer shall, during the term of this contract, be entitled to have and use such condensed steam coming from the heating mains as the Consumer may desire, but in case Consumer does use such condensation, it shall be taken from the outlet pipe of the meters and so taken as not to interfere with the operation or action of any of the apparatus furnished by the Company or interfere with the action of the heating System.

The Company agrees to use reasonable care and skill to supply steam according to the provisions of this agreement, it being understood that the Consumer assumes any risk of interruption of its steam supply due to accidents or other circumstances beyond the control of the Company. The Company has the right to remove the meters and all other material and appliances installed at its expense and to discontinue the supply of steam, upon first giving five (5) days notice in writing of an intention so to do, whenever any bills for said service are in arrears or for mis-

representation in relation to consumption of steam, or upon the violation by the Consumer of any of the terms and conditions of this contract, provided that within such five (5) days any reasonable losses sustained by the Company [fol. 30-53] due to above cause or causes have not been made good to the Company by Consumer.

All service pipes, valves and meters placed in the said buildings by the Company shall be and remain the property of the said Company and it shall have the right at all times through its duly authorized agents to have access thereto for the purpose of inspecting or repairing the same and the said Company shall also have the right at reasonable times to inspect the apparatus throughout the said period.

It is agreed that from the 1st of November until the 1st of May succeeding there shall be a continuous supply of steam for the said buildings with a pressure of about one pound per square inch at service valve, and that during October and May such steam shall be furnished as weather conditions demand, it being understood that during these two months the steam heat service will be the same as that supplied to the various office buildings on said Company's service mains.

It is understood that the heating season, as that phrase is used in this contract, is the period in which steam is to be furnished by the Company, said period beginning October 1st and ending May 31st of the succeeding year, it being understood that the Company is not required to supply steam during that part of the year not included in the heating season.

It is expressly agreed Consumer shall have the option by giving written notice to the Company, its successors, or assigns, on or before June 2nd 1913, of extending the terms of this contract for a period of five (5) years, but should the [fol. 30-54] Consumer desire to terminate this contract at the expiration of the fifth (5) year, notice in writing must be given the Company ninety (90) days prior to the expiration thereof, and the Consumer shall thereby have the option to purchase all pipes, valves, and fittings installed by the Company under this contract. The purchase price to be the total cost of all labor and material used in installing said valves, pipes and fittings and to pay the Company net cost for labor for disconnecting said pipes, valves

and fittings from the Company's service mains, said bills to be paid upon presentation.

The Consumer agrees to maintain the heating systems steam tight so that there shall be no loss to the Company either of steam or hot water and to use all reasonable diligence in maintaining his heating systems in first class shape and to see that only enough steam is used to properly heating the buildings. It is further agreed that all pipes and fittings carrying steam not covered with standard pipe covering shall be counted as radiating surface.

It is further agreed that in consideration of the Company's service pipe being run to the property line free of cost to the Consumer that the Company shall have the right and privilege to extend said service pipe through the basement of Consumer's buildings as directed by Consumer to adjacent buildings for the purpose of supply- same with heat, it being understood that the Company will repair all damages to the building walls caused by its service pipes or service pipe extensions.

The Company agrees to excavate the streets for installa- [fol. 30-55] tion of pipes, etc., necessary to carry out the terms of this contract under city permits taken out in the name of William E. Minor, but it is expressly agreed that all pipes, etc., so installed are to be and remain the property of the Company, as long as Consumer uses steam and unless consumer purchases said pipes under option as proided for elsewhere in this contract.

The Company agrees to furnish and set the inside service valve to the wall of building, the necessary traps and the necessary meters; all other fittings, pipes and labor required inside the building to be done by Consumer.

All prior agreements are merged in this instrument and no modification hereto is binding unless made in writing.

This Contract although signed is subject to the approval of the General Manager of the Company and shall not be binding on the Company until endorsed by his approval.

It is finally agreed that all the terms and stipulations heretofore made and agreed by said Consumer and said Company relative to this heating service are merged in this contract and that no previous or contemporaneous representations or agreements made by the Company's officers or agents shall be binding on the Company, except to the extent herein contained.

This contract shall bind the parties hereto their successors and legal representatives.

In Witness Whereof, The Said Company, and the said Consumer have hereunto caused their names to be signed by their duly authorized officers and their corporate seals [fols. 30-56 & 30-57] to be hereunto affixed, the day and the year first above written.

Executed in duplicate, this 27th day of Feb. 1908.

Kansas City Heating Company, (Signed) by C. F. Farley. (Seal.)

Midland Realty Co., Consumer, per —— ——, (Signed) by William E. Minor Pres. (Seal.)

Approved Feb. 27, 1908, by (Signed) R. E. Richardson, General Manager."

COLLOQUY

Mr. Jones: Now, that contract provides—it runs for five years, with an option or right to the defendant, Midland Realty Company, to have an extension of five years, upon giving notice. Mr. Graves, will you concede that that option was exercised and the contract was extended for five additional years?

Mr. Graves: Yes, sir.

Mr. Jones: Up until August 31, 1918; I think you offered in evidence——

Mr. Graves: I offered in evidence 5 P. S. C. 664—yes, Case 1353, I offered that.

Mr. Jones: Now, Mr. Graves, you are conceding—the plaintiff and defendant, or the plaintiff and defendant's predecessors operated under and steam heat was furnished to the defendant under and by virtue of that contract, up to August 1st, 1917?

Mr. Graves: That's correct.

Mr. Jones: That's all, Your Honor.

[fols. 30-58–30-60] TESTIMONY IN REBUTTAL

Mr. Graves: Plaintiff now offers in evidence the Public Service Commission Act, passed in 1913, as shown in the Laws of Missouri, 1913, beginning with page 556 and end-

ing at page 651, showing the approval of that Act by the Governor, March 17, 1913; and Section 140, particularly, which was the emergency clause declaring the Act (Section 140) an emergency:

Mr. Jones: The court will take judicial notice of that.

The Court: Yes.

[fol. 30-61] Whereupon, the plaintiff rested its case.

And the foregoing was all the evidence offered and introduced at the trial of this cause.

DECLARATIONS OF LAW REQUESTED BY DEFENDANT-APPELLANT

Whereupon, at the close of all the evidence, the defendant requested the court to make the following declarations of law:

"1

The court declares the law to be that, under the pleadings and the evidence, the finding and judgment of the court must be in favor of defendant on counts one to five, inclusive, of plaintiff's petition."

(Given.)

"6

The court declares the law to be that the finding of fact by the Public Service Commission that the schedule of heat rates, plaintiff's Exhibit '1,' which named August 1, 1917, as its effective date, was unreasonable and unlawful, by the decision reported in 5 Mo. P. S. C. 664-683, operates to deny to plaintiff the right asserted in counts one to five, inclusive, of its petition, to recover from defendant the difference between what defendant paid, according to its contract, and what the charges for heating service to defendant would amount to, according to plaintiff's said filed schedule."

(Given.)

[fol. 30-62]

"7

The court declares the law to be that the filing by Kansas City Heating Company of its schedule of rates, plaintiff's Exhibit '1,' effective August 1, 1917, had no greater effect,

if any, than to make such schedule prima facie reasonable and lawful, and that the finding of fact by the Public Service Commission, upon a hearing, that such schedule was unjust and unreasonable, was a conclusive determination of such fact, as respects the time between August 1, 1917, and March 1, 1918, and that such finding (5 Mo. P. S. C. 664) operated to destroy the prima facie reasonableness and legality of said schedule when filed, if any such it ever had."

(Given.)

"8

The court declares the law to be that, assuming that Kansas City Heating Company had the right to file its schedule, designated as effective August 1, 1917, and to thereafter charge for its service according to said schedule, if just and reasonable, nevertheless said company was bound, at its peril, to take care and see that its rates, named in such schedule, were actually just and reasonable, for the law prescribed that 'every unjust or unreasonable charge is prohibited.' So, if the Public Service Commission, on a hearing, duly made a finding of fact that the rates named in said schedule were 'unjust and unreasonable,' said schedule of rates was not a lawful one, and plaintiff is not entitled to recover anything thereunder from defendant in this suit."

(Given.)

[fol. 30-63] "11

The court declares that there is no evidence that there ever was any hearing before the Public Service Commission or other tribunal since the *the* enactment of the Public Service Commission Act of Missouri as to whether or not defendant's contract, here in question, was or continued to be in force and effect, or as to whether or not the rates named in said contract were just and reasonable for the service rendered or to be rendered to the defendant herein by Kansas City Heating Company during the period from August 1, 1917, to March 1, 1918, and that there is no evidence that there was ever any express finding on such questions by the Public Service Commission or other tribunal affecting said period of time. Therefore, the court declares

the law to be that to permit plaintiff to impose upon and collect from defendant for steam heating service, as demanded in counts one to five, inclusive, of plaintiff's petition herein, would be in violation of Section 10, Article 1, of the Constitution of the United States, which provides that no state shall pass any law impairing the obligation of contracts. The court further declares the law to be that to permit plaintiff to recover as prayed in counts one to five, inclusive, of its petition, notwithstanding defendant's contract in evidence, would be the taking of defendant's property rights in said contract without due process of law, in violation of Section 1, Article 14, of the amendments to the Constitution of the United States."

(Given.)

[fol. 30-64] "13

The court declares the law to be that if defendant's contract, here in question and in evidence, was in force and effect from August 1, 1917, to March 1, 1918, then plaintiff cannot recover on counts one to five, inclusive, of its petition; and that the burden is on plaintiff to show that said contract was not then in full force and effect."

(Given.)

"14

The court declares the law to be that if defendant's contract here in question and in evidence, was in force and effect from March 1, 1918, to August 31, 1918, then plaintiff cannot recover on counts six to eleven, inclusive, of its petition; and that the burden is on plaintiff to show that said contract was not then in full force and effect."

(Given.)

Which said declarations of law numbered "1," "6," "7," "8," "11," "13" and "14," and each of them, the court marked "Given"; to which ruling and action of the court in giving said declarations of law numbered "1," "6," "7," "8," "11," "13" and "14," and each of them, the plaintiff at the time duly excepted and still excepts.

The defendant also requested the court to give the following declarations of law:

"2

The court declares the law to be that, under the pleadings and the evidence, the finding and judgment of the court [fol. 30-65] must be in favor of defendant on counts six to eleven, inclusive, of plaintiff's petition."

(Refused.)

"4

The court declares the law to be that Section 87, paragraph 4, Article V (Laws 1913, p. 621), of the Missouri Public Service Commission Act was applicable in 1917 to Kansas City Heating Company, and that such provision of the act operated to keep in force and effect defendant's contract, in evidence, during the period involved in counts one to five, inclusive, of plaintiff's petition herein."

(Refused.)

"5

The court declares the law to be that Section 87, paragraph 4, Article V (Laws 1913, p. 621), of the Public Service Commission Act, was applicable in 1918 to Kansas City Heating Company, and that such provision of the act operated to keep in force and effect defendant's contract, in question, during the period involved in counts six to eleven, inclusive, of plaintiff's petition herein."

(Refused.)

"9

The defendant requests, as to each count, respectively and separately, of the petition herein, that the court declare the law to be that to permit plaintiff to recover, as prayed in its petition herein, would be in violation of Sec- [fol. 30-66] tion 10, Article 1, of the Constitution of the United States, which provides that no state shall pass any law impairing the obligation of contracts."

(Refused.)

"10

The defendant requests, as to each count, respectively and separately, of the petition herein, that the court declare

the law to be that to permit plaintiff to recover, as prayed in its petition herein, would be the taking of defendant's property rights in its contract, here in question and in evidence, without due process of law, in violation of Section 1, Article 14, of the amendments to the Constitution of the United States."

(Refused.)

"12

Defendant asks, separately, that the court make the same findings and declarations of law, as stated in the previous request No. 11, with respect to counts 6 to 11, inclusive. of plaintiff's petition, and the period of time concerned therein, namely, March 1, 1918, to August 31, 1918."

(Refused.)

Which said declarations of law numbered "2," "4," "5," "9," "10" and "12" the court refused; to which ruling and action of the court in refusing to give said declarations of law numbered "2," "4," "5," "9," "10" and "12," and each of them, the defendant at the time duly excepted and still excepts.

[fol. 30-67] The defendant also requested the court to give the following declarations of law:

"3

The court declares the law to be that if the court finds, from the evidence, that plaintiff's predecessor company, Kansas City Heating Company, merely 'filed' in the office of the Public Service Commission its schedule of heating rates, plaintiff's Exhibit '1' in evidence, wherein August 1, 1917, is named as its effective date, and that the Commission held no hearing and made no order thereon, prior to March 1, 1918, then that schedule did not have the effect of abrogating defendant's contract, in evidence, for heating rates, and does not justify plaintiff in demanding, in counts one to five, inclusive, of its petition, any charges for heating service in excess of the rates named in defendant's said contract, by virtue of said filed schedule."

Which said declaration of law number "3" as requested by the defendant, the court refused to give; to which action and ruling of the court in refusing to give said declaration

"3" as requested by the defendant, the defendant then and there at the time duly excepted and still excepts.

Th court, of its own motion, modified said declaration of law "3" as requested by the defendant and gave said declaration of law "3" in its changed and modified form as follows:

[fol. 30-68] "3

The court declares the law to be that if the court finds, from the evidence, that plaintiff's predecessor company, Kansas City Heating Company, merely 'filed' in the office of the Public Service Commission its schedule of heating rates, plaintiff's Exhibit '1' in evidence, wherein August 1, 1917, is named as its effective date, and that the Commission held no hearing and made no order thereon, prior to March 1, 1918, then that schedule, if unreasonable, did not have the effect of abrogating defendant's contract, in evidence, for heating rates, and does not justify plaintiff in demanding in counts one to five, inclusive, of its petition, any charges for heating service in excess of the rates named in defendant's said contract, by virtue of said filed schedule."

(Modified.)

To which ruling and action of the court in modifying said declaration of law "3," as requested by the defendant, and giving said declaration of law "3" so modified, the defendant at the time duly excepted and still excepts; and to the giving of the said modified declaration of law "3" the plaintiff at the time duly excepted and still excepts.

VERDICT AND JUDGMENT

Whereupon, and on said 27th day of August, 1932, the court then and there entered judgment herein, which, omitting caption, is in words and figures as follows, to-wit:

[fol. 30-69] (Said judgment has hereinbefore been set out as a part of the record proper and reference is made thereto.)

Motion for New Trial of Plaintiff-Appellant

On the 27th day of August, 1932, the same being the 60th day of the May Term, 1932, of said court, the same being the same term within which the judgment was entered, within four days after rendition of verdict and judgment herein, the plaintiff-appellant filed its motion for new trial in words and figures as follows, to-wit:

"Comes now the above named plaintiff and moves the court to set aside the findings and judgment herein, and to grant to it a new trial herein, and for reasons therefor states:

I

The court erred in finding the facts and issues herein as stated by the court in favor of the defendant and against the plaintiff upon counts 1, 2, 3, 4 and 5 of the second amended petition herein, such findings being unsupported by the evidence, contrary to the evidence and to the greater weight thereof, and contrary to the law governing and controlling the issues herein between plaintiff and defendant.

II

The court erred in rendering a judgment for the defendant in this action upon counts 1, 2, 3, 4 and 5 of the second amended petition herein, the same being contrary [fol. 30-70]' to the evidence herein and to the greater weight thereof, and the defendant was not entitled under the law, and under the law and facts, to a judgment upon said counts 1, 2, 3, 4 and 5 of the second amended petition herein.

III

The court erred in not finding the facts and issues in favor of the plaintiff upon counts 1, 2, 3, 4 and 5 of the second amended petition herein, and in failing to render judgment in favor of the plaintiff and against the defendant upon counts 1, 2, 3, 4 and 5 of the second amended petition herein.

IV

The court erred in giving declarations of law Nos. 1, 6, 7, 8, 11, 13 and 14 as asked by the defendant, and declara-

tion of law No. 3 as asked by the defendant and modified by the court, all of said declarations of law being contrary to the facts herein, contrary to the law governing this case, and contrary to the facts and the law governing this case.

And defendant asks the judgment of the court."

MOTION FOR NEW TRIAL OF DEFENDANT-APPELLANT

On the 31st day of August, 1932, in vacation, within four days after the rendition of the verdict and judgment herein, the defendant-appellant filed its motion for new trial, in words and figures as follows, to-wit:

[fol. 30-71] "Now comes defendant and moves the court to set aside the finding and verdict herein upon counts 6, 7, 8, 9, 10 and 11 of the second amended petition herein, and to grant defendant a new trial upon said counts, and each of them, for the following reasons:

(1) Because the court erred in finding the facts and issues in favor of the plaintiff and against defendant, upon counts 6, 7, 8, 9, 10 and 11 of the second amended petition herein, such findings being unsupported by and contrary to the evidence, and contrary to the greater weight of the evidence, and being contrary to the law governing and controlling the issues herein on said counts, and each of them.

(2) The court erred in rendering a judgment for plaintiff against defendant on counts 6, 7, 8, 9, 10 and 11 of the second amended petition herein, and each of them, because the same is unsupported by and contrary to the evidence and is contrary to the law applicable to the issues upon said counts, and each of them.

(3) Because the court erred in refusing and failing to give each of the declarations of law asked by the defendant, but by the court refused, and particularly erred in refusing to give declarations of law numbered "2," "4," "5," "9," "10" and "12" asked by the defendant.

(4) Because the court erred in its judgment herein in assessing all of the costs of this case against the defendant.

Wherefore, defendant prays the judgment of the court herein."

[fols. 30-72–30-74] MOTIONS FOR NEW TRIAL OF APPELLANTS OVERRULED

And thereafter, on the 7th day of January, 1933, the same being the 45th day of the November term, 1932, of said court, the motion for new trial of plaintiff-appellant and the motion for new trial of defendant-appellant came on to be heard before the court, the parties being present by attorneys, and the court, having heard arguments of counsel and being fully advised in the premises, upon due consideration, overruled both said motions for new trial. The appellants then and there at the time duly excepted and still except.

[fol. 30-75] ORDER ALLOWING BILL OF EXCEPTIONS

And, thereafter, on the 6th day of May, 1933, the same being the 47th day of the March, 1933, term of said court, the bill of exceptions was in time filed by the appellants in the office of the clerk of the Circuit Court of Jackson County, Missouri, at Kansas City, and on said day the court allowed, signed, sealed and ordered the said bill of exceptions to be made a part of the record herein.

The signature of the judge signing and allowing said bill of exceptions was as follows:

"T. J. Seehorn, Judge of Division No. 3 of the Circuit Court of Jackson County, Missouri, at Kansas City."

And the filing mark of the clerk of the Circuit Court of Jackson County, Missouri, at Kansas City, appearing on the back of said bill of exceptions is as follows:

[fol. 30-76] "Filed May 6, 1933, Lynn G. Buford, Clerk By J. A. Shannon, Deputy Clerk."

A fair abstract of the record, including the record proper and bill of exceptions.

Johnson, Lucas, Landon, Graves & Fane, Attorneys for Plaintiff-Appellant. Scarritt, Jones & North, Attorneys for Defendant-Appellant.

[fol. 31] IN SUPREME COURT OF MISSOURI

[Title omitted]

ORDER APPROVING APPEAL BOND—July 7, 1936

Comes now the defendant-appellant, by attorney, and presents to the Court its appeal bond in the sum of Seven Thousand Dollars, which said bond has been duly approved by counsel for plaintiff-appellant. It is therefore ordered that said bond be, and the same is hereby approved and ordered filed.

Clerk's certificate to foregoing transcript omitted in printing.

[fol. 32] SUPREME COURT OF THE UNITED STATES

STATEMENT OF THE POINTS ON WHICH APPELLANT INTENDS TO RELY, AND OF THE PARTS OF THE RECORD WHICH IT THINKS NECESSARY FOR THE CONSIDERATION THEREOF—Filed July 31, 1936

(1) By virtue of paragraph 12 of Section 5190, Revised Statutes of Missouri, 1929, Vol. I, page 1448, appellee, a public utility corporation, filed with the Public Service Commission a schedule of rates, for its steam heating service, for its customers, generally, on June 19, 1917. No hearing, finding or order whatsoever was had or made by the Commission with respect to said schedule. There was then in force a contract between Appellant and Appellee for steam heating service, which was entered into prior to the enactment of the Public Service Commission Law of Missouri (Chapter 33, Revised Statutes Missouri 1929).

That contract was fully performed by both parties throughout its term. Appellant has contended and still contends that to so construe and apply said statute to the effect that it served, upon the mere filing of a schedule of [fol. 33] rates, for its heating customers, generally, by Appellee, to abrogate and make nugatory Appellant's said contract, renders said statute to be repugnant to and violative of Section 10 of Article 1 of the Constitution of the United States, which provides that no state shall pass any law impairing the obligation of contracts, and repugnant to and violative of the Fourteenth Amendment to said Con-

stitution, which prohibits the taking of one's property without due process of law.

This point affects the first five counts of Appellee's petition herein.

(2) By virtue of paragraph 5 of Section 5190, Revised Statutes of Missouri, 1929, the Public Service Commission promulgated a schedule of rates for Appellee's heating customers, generally, effective March 1, 1918. At that time the Commission did not consider or make any finding or order with respect to Appellant's said heating contract. Thereafter Appellee continued to render heating service to Appellant throughout the term of said contract, and Appellant continued to and did pay for the same, in accordance with said contract.

About two years after said contract had been fully performed and rights thereunder had become vested, Appellee brought this suit against Appellant. By the first five counts of its petition Appellee seeks to recover the difference between what Appellant paid, according to contract, and what it contends that Appellant should have paid, for heating service from October 1, 1917 to March 1, 1918, according to the schedule of rates, which was merely filed, as aforesaid. By the last six counts of its petition Appellee seeks to recover the difference between what Appellant paid, according to said contract, for heating service from March 1, 1918 to August 31, 1918, and what Appellee claims that Appellant should have paid according to said schedule [fol. 34] of rates promulgated by the Commission, effective March 1, 1918.

As affecting the last six counts of the petition herein, Appellant has contended and still contends that to so construe and apply the said statute of Missouri to the effect that it served, by the mere promulgation of a schedule of rates for Appellee's heating customers, generally, to abrogate and make nugatory Appellant's said contract, which was fully performed, without any hearing, finding or order having been had or made by the Commission with respect thereto, renders said statute to be repugnant to and violative of Section 10 of Article 1 of the Constitution of the United States, which provides that no state shall pass any law impairing the obligation of contracts, and repugnant to and violative of the Fourteenth Amendment to said Constitution, which

prohibits the taking of one's property without due process of law.

The decision of the Supreme Court of Missouri was against the contentions of Appellant and in favor of the validity of said statutes, so construed and applied. The amount involved herein being less than $7,500.00 the Supreme Court of Missouri acquired and entertained jurisdiction of this case solely by reason of the questions aforesaid arising under the Constitution of the United States.

The Record

Appellant considers that the whole of the record, as filed herein, is necessary for the consideration of the points on which it intends to rely. The clerk will, therefore, please cause to be printed the whole record, as filed, omitting only captions on papers filed, and filing marks thereon, unless the dates of filing are important.

Respectfully submitted, Elliott H. Jones, William C. Scarritt, Counsel for Appellant.

[fol. 35] Acknowledgment of Service of Certain Papers

The undersigned, counsel for appellee, acknowledge service of copies of the following papers:

(1) Motion of appellant for leave to file supplemental statement as to jurisdiction;

(2) Supplemental statement as to jurisdiction;

(3) Statement of points intended to be relied on, upon the appeal, and of the parts of the record necessary for the consideration of the same.

Ludwick Graves, Irvin Fane, Counsel for Appellee.

July 29, 1936.

[fol. 36] [File endorsement omitted.]

Endorsed on cover: Enter Elliott H. Jones. File No. 40,757. Missouri Supreme Court. Term No. 217. Midland Realty Company, appellant, vs. Kansas City Power & Light Company. Filed July 22, 1936. Term No. 217, O. T., 1936.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 217

MIDLAND REALTY COMPANY, A CORPORATION,
Appellant,

vs.

KANSAS CITY POWER & LIGHT COMPANY,
A CORPORATION,
Appellee.

MOTION OF APPELLANT FOR LEAVE TO FILE ADDITIONAL STATEMENT AS TO JURISDICTION.

Now comes appellant, Midland Realty Company, and being advised by the clerk of this Court that there is some doubt as to whether the statement as to jurisdiction, contained in the petition for appeal, fully complies with the rules of this Court, moves and requests that an order be made by the court permitting it to file herein the "Supplemental Statement as to Jurisdiction" herewith presented.

Appellant's counsel, induced by an examination of the forms of petitions for appeal set forth in the recognized authority, Hughes Federal Practice, construed the court's rule as requiring a full statement as to jurisdiction only when the petition for appeal was presented to a justice of

the United States Supreme Court, and not when it was presented to the State Supreme Court. That seemed to be a practical construction of the rule because the judges of the Supreme Court of Missouri, having just considered the case, well knew that there were questions therein arising under the Constitution of the United States, and that the questions were such as, in their opinion, to entitle appellant to appeal to this Court, as a matter of right, under Title 28, Section 344(a), U. S. C. A.

Respectfully submitted,

ELLIOTT H. JONES,
WILLIAM C. SCARRITT,
Counsel for Appellant.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 217

MIDLAND REALTY COMPANY, A CORPORATION,
Appellant,

vs.

KANSAS CITY POWER & LIGHT COMPANY, A CORPORATION,
Appellee.

STATEMENT AS TO JURISDICTION.

A.

The statutory provision believed to sustain the jurisdiction of this Court upon appeal is Section 237 of the Judicial Code (Sec. 344 (a), Title 28, United States Code Annotated). Under that statutory provision a review may be had in the Supreme Court of the United States on writ of error (now appeal) as a matter of right, in this case.

The judgment of the Supreme Court of Missouri, Division No. 1, the highest court of the State, appealed from was rendered on April 23, 1936, and the appeal herein was applied for to and allowed by the Presiding Judge of Division No. 1 of the Supreme Court of Missouri and by the Chief Justice of said court on June 27, 1936. Said judg-

ment was that the finding of the trial court be reversed and the cause remanded to the trial court with directions to enter judgment in favor of plaintiff on all counts of its petition as prayed. Such a judgment leaving nothing for the trial court to do other than to perform the ministerial act of entering the directed judgment is a final judgment from which an appeal lies to this Court.

Mower v. *Fletcher,* 114 U. S. 127;
Georgia Ry. & Power Co. v. *Decatur,* 262 U. S. 432;
Rio Grande Ry. v. *Stringham,* 239 U. S. 44.

B.

The nature of this case is thus: On February 27, 1908, appellant entered into a contract, in evidence, with appellee herein for steam heating service at the rates therein named for a term beginning September 1, 1908, and ending August 31, 1918. Appellee furnished steam heat to appellant during the whole term of said contract and appellant paid in full according to the contract for said service.

In the year 1913 there was enacted what is known as the Public Service Commission Law of Missouri (Chapter 33, Revised Statutes of Missouri (1929). On June 19, 1917, appellee filed with the Public Service Commission a schedule of rates for steam heat service, for its customers generally, but no finding or order was made by the Commission with respect thereto. The rates named in that schedule were higher than the rates provided in said contract. Said schedule of rates was filed by virtue of paragraph 12 of Section 5190, Revised Statutes of Missouri 1929, Vol. I, page 1448, which is as follows:

> "Have power to require every gas corporation, electrical corporation, water corporation and municipality to file with the commission and to print and keep open to public inspection schedules showing all rates and charges made, established or enforced or to be charged

> or enforced. * * * Unless the commission otherwise orders, no change shall be made in any rate or charge, or in any form of contract or agreement or any rule or regulation relating to any rate, charge or service, or in any general privilege or facility, which shall have been filed and published by a gas corporation, electrical corporation, water corporation or municipality in compliance with an order or decision of the commission, except after thirty days' notice to the commission and publication for thirty days as required by order of the commission, which shall plainly state the changes proposed to be made in the schedule then in force and the time when the change will go into effect. * * * No corporation or municipality shall charge, demand, collect or receive a greater or less or different compensation for any service rendered or to be rendered than the rates and charges applicable to such services as specified in its schedule filed and in effect at the time; * * *"

Thereafter a complaint was lodged with the Commission against such filed schedule of heating rates by certain heat customers (not including appellant) and after a hearing on February 11, 1918, said Commission made a finding and order setting aside the said filed schedule of rates as being unlawful, and promulgating a schedule of heating rates effective March 1, 1918, for appellee's heat customers generally, in which the named rates were somewhat higher than those named in appellant's contract aforesaid (5 Mo. P. S. C. Rep. 664, 683).

Said schedule of rates was promulgated by the Commission by authority of paragraph 5 of Section 5190, Revised Statutes of Missouri 1929, Vol. I, page 1446, which is as follows:

> "* * * Whenever the commission shall be of the opinion, after a hearing had upon its own motion or upon complaint, that the rates or charges or the acts or

> regulations of any such persons, corporations or municipalities are unjust, unreasonable, unjustly discriminatory or unduly preferential or in anywise in violation of any provision of law, the commission shall determine and prescribe the just and reasonable rates and charges thereafter to be in force for the service to be furnished. * * *"

The statutes above quoted mention only gas and electrical companies but were made applicable to heating companies by Section 5228, Revised Statutes of Missouri 1929.

No complaint was made by appellee or other party concerning appellant's said contract before said Commission or otherwise, and no finding or order was ever made with respect thereto by the Commission or other tribunal. On the contrary, appellee continued to render heating service to appellant and appellant continued to pay for the same in accordance with the contract throughout the full term of the contract, that is to say, the contract was fully performed on both sides.

About two years after the contract had expired according to its terms and had been fully performed, appellee instituted this suit against the appellant in the Circuit Court of Jackson County, Missouri. In the first five counts of its petition herein appellee seeks to recover of appellant the difference between what appellant paid according to contract for heating service in the months of October, November and December, 1917, and January and February, 1918, and what appellee claims that appellant should have paid according to said schedule which was filed, and later, annulled by the Commission. Appellee seeks to recover in the last six counts of its petition herein the difference between what appellant paid according to contract and what appellee claims that appellant should have paid according to said schedule promulgated by the Commission for heating service from March 1, 1918, to August 31, 1918.

The case was tried before the court without a jury. The appellant, in its answer and by requested declarations of law in the trial court, contended that the provisions of said Public Service Commission law so construed and applied as to abrogate and render nugatory its said contract, which was fully performed, without any hearing or finding or order having been had or made by the Commission or other tribunal with respect to said contract, violated and were repugnant to Section 10, Article 1, of the Constitution of the United States, which provides that no State shall pass any law which impairs the obligations of contracts, and violate the Fourteenth Amendment to said Constitution, which prohibits the taking of one's property without due process of law.

The decision of the Supreme Court of Missouri, Division No. 1, was against the contention of appellant and in favor of the validity of said statutes as so contrued and applied.

The constitutional question is a substantial one. Let it be understood that this case does not present the old question, heretofore so thoroughly settled, that the State did not have the right and power to abrogate a private contract with a public utility company which was entered into before the passage of the Public Service Commission law. The question here presented upon the first five counts of plaintiff's petition is, did the mere enactment of the Public Service Commission law and the mere *ex parte* act of the utility company in filing a schedule of rates by virtue thereof, serve to abrogate and render nugatory a contract with said utility company for its service although said contract was fully performed on both sides and although no hearing, finding or order of the Public Service Commission was ever had or made with respect to said contract? The question presented upon the last six counts of plaintiff's petition herein is whether a schedule of rates promulgated by the

Commission for the utility company's customers generally, served, *ipso facto*, to abrogate and render nugatory appellant's said contract for heating service, which was fully performed and concerning which the Commission never had a hearing or made any finding or order.

C.

The cases of *Wichita R. R. & Light Co.* v. *Public Utility Com. of Kansas*, 260 U. S. 48, and *Arkansas Natl. Gas Co.* v. *Arkansas R. R. Com.*, 261 U. S. 379, are directly in point and are contrary to the decision of the Supreme Court of Missouri. Those cases and the following decisions of this Court are believed to sustain jurisdiction in this Court of this appeal:

Baldwin v. *Missouri*, 281 U. S. 586;
First Natl. Bank v. *Maine*, 284 U. S. 312;
Hans Rees' Sons v. *State of North Car.*, 283 U. S. 125;
Chicago, R. I. & P. Ry. Co. v. *Perry*, 259 U. S. 548;
New York ex rel. Bryant v. *Zimmerman*, 278 U. S. 63.

Respectfully submitted,

ELLIOTT H. JONES,
WILLIAM C. SCARRITT,
For Appellant.

(8050-C)

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Supreme Court of the United States

OCTOBER TERM, 1936.

No. 217.

MIDLAND REALTY COMPANY, APPELLANT,

VS.

KANSAS CITY POWER & LIGHT COMPANY, APPELLEE.

APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSOURI.

BRIEF FOR APPELLANT.

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Supreme Court of the United States

OCTOBER TERM, 1936.

No. 217.

MIDLAND REALTY COMPANY, APPELLANT,

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KANSAS CITY POWER & LIGHT COMPANY, APPELLEE.

APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSOURI.

BRIEF FOR APPELLANT.

I.

The decision of the Supreme Court of Missouri, appealed from, is reported as *Kansas City Light & Power Co.* v. *Midland Rea'ty Co.*, 93 S. W. (2d) 954. It is not yet reported in the Missouri state reports.

The Supreme Court sits in two divisions and, under certain circumstances, as the court "*in banc.*" The decision of a case assigned to a division is that of the Su-

preme Court of Missouri. This case was assigned to Division No. 1. After an adverse decision therein the appellant here moved to have the case transferred to the court *in banc*, which was denied (Rec. 17). The decision herein rendered and appealed from is that of the highest court of the state. The judgment rendered was as follows:

> "The judgment of the circuit court is reversed and the cause remanded with directions to enter judgment for the plaintiff on all counts of the petition as prayed therein" (Rec. 15, 17).

That is a final judgment from which appeal lies to this court.

Mower v. *Fletcher*, 114 U. S. 127.
Georgia Ry. & Power Co. v. *Decatur*, 262 U. S. 432.
Rio Grande Ry. v. *Stramgham*, 239 U. S. 44.

II.

Appellant has heretofore filed in this court a statement as to jurisdiction, in accordance with Paragraph 1 of Rule 12, and the court has thereupon made the order, "probable jurisdiction noted."

III.

STATEMENT.

The contract which is here in question was made between appellant and Kansas City Heating Company. It is alleged, and agreed, that appellee, Kansas City Power & Light Co., succeeded to all the rights and obligations

of said heating company under said contract. We will, therefore, treat the contract as if made, originally, by appellee.

On February 27, 1908, appellant entered into a contract (Rec. 47) with appellee herein for steam heating service at the rates therein named for a term of five years, beginning September 1, 1908, with the option in appellant to extend the same for an additional five years, which option was duly exercised (Rec. 52). Appellee furnished steam heat to appellant during the whole ten-year term of said contract and appellant paid in full, according to the contract, for said service.

In the year 1913 there was enacted what is known as the Public Service Commission Law of Missouri (Chapter 33, Revised Statutes of Missouri, 1929). On June 19, 1917, appellee filed with the Public Service Commission a schedule of rates (Rec. 45) for steam heat service. The commission made no finding of order whatsoever, at that time, with respect to said rate schedule. It was merely filed. The rates named in that schedule were higher than the rates provided in said contract. Said schedule of rates were filed by virtue of Paragraph 12 of Section 5190, Revised Statutes of Missouri, 1929, Vol. I, page 1448, which enumerates certain powers of the commission, the pertinent part of which is as follows:

> "Have power to require every gas corporation, electrical corporation, water corporation and municipality to file with the commission and to print and keep open to public inspection schedules showing all rates and charges made, established or enforced or to be charged or enforced. * * * Unless the commis-

> sion otherwise orders, no change shall be made in any rate or charge, or in any form of contract or agreement or any rule or regulation relating to any rate, charge or service, or in any general privilege or facility, which shall have been filed and published by a gas corporation, electrical corporation, water corporation or municipality in compliance with an order or decision of the commission, except after thirty days' notice to the commission and publication for thirty days as required by order of the commission, which shall plainly state the changes proposed to be made in the schedule then in force and the time when the change will go into effect. * * * No corporation or municipality shall charge, demand, collect or receive a greater or less or different compensation for any service rendered or to be rendered than the rates and charges applicable to such services as specified in its schedule filed and in effect at the time; * * *"

Shortly thereafter a complaint was lodged with the commission against such filed schedule of heating rates by certain heat customers (not including appellant) and, after a hearing, the commission, on February 11, 1918, made a finding and order setting aside the said filed schedule of rates as being unreasonable, excessive and unlawful. The commission, at the same time, promulgated a schedule of heating rates, effective March 1, 1918, for appellee's heat customers generally, in which the named rates were somewhat higher than those named in appellant's contract, aforesaid. Said finding and order of the commission is found in its officially published reports (5 Mo. P. S. C. Rep. 664-683).

Said schedule of rates was promulgated by the commission by authority of Paragraph 5 of Section 5190, Re-

vised Statutes of Missouri, 1929, Vol. I, page 1446, which is as follows:

> "* * * Whenever the commission shall be of the opinion, after a hearing had upon its own motion or upon complaint, that the rates or charges or the acts or regulations of any such persons, corporations or municipalities are unjust, unreasonable, unjustly discriminatory or unduly preferential or in anywise in violation of any provision of law, the commission shall determine and prescribe the just and reasonable rates and charges thereafter to be in force for the service to be furnished. * * *"

The statutes above quoted mention only gas and electrical and water companies but were made applicable to heating companies by Section 5228, Revised Statutes of Missouri, 1929.

No complaint was made by appellee or other party concerning appellant's said contract before said commission or otherwise, and no finding or order was ever made with respect thereto by the commission. On the contrary, appellee continued to render heating service to appellant and appellant continued to pay for the same, in accordance with the contract, throughout the full term of the contract. That is to say, the contract was fully performed on both sides.

About three years after the contract had expired, according to its terms, and had been fully performed, that is, on August 27, 1921, appellee instituted this suit against the appellant in the Circuit Court of Jackson County, Missouri. In the first five counts of its petition herein appellee seeks to recover of appellant the difference between what appellant paid, according to contract, for heat-

ing service in the months of October, November and December, 1917, and January and February, 1918, and what appellee claims that appellant should have paid according to said schedule which was merely filed, and, later, was annulled by the commission as aforesaid. Appellee seeks to recover, in the last six counts of its petition herein, the difference between what appellant paid, according to contract from March 1 to August 31, 1918, and what appellee claims that appellant should have paid, according to said schedule, which was put into effect by the commission as of March 1, 1918 (Rec. 45, 46, 5 Mo. P. S. C. Rep. 683).

The case was tried before the court without a jury. The appellant, in its answer (Rec. 33) and by requested declarations of law (Rec. 53-58) in the trial court, contended that the provisions of said Public Service Commission law so construed and applied as to abrogate and render nugatory its said contract, which was fully performed, without any hearing or finding or order having been had or made by the commission or other tribunal with respect to said contract, violated and were repugnant to Section 10, Article I of the Constitution of the United States, which provides that no state shall pass any law which impairs the obligations of contracts, and violates the Fourteenth Amendment to said Constitution, which prohibits the taking of one's property without due process of law.

The decision of the trial court was in favor of defendant (appellant here) on the first five counts of the petition, and against it on the last six counts. Plaintiff

and defendant duly perfected cross appeals to the Supreme Court of Missouri.

The decision of the Supreme Court of Missouri was against defendant (appellant here) on all counts of the petition, that is, the decision of said court was against the constitutional contentions of appellant, and in favor of the validity of said statutes as so construed and applied. For the decision of said court see *K. C. P. & L. Co.* v. *Midland Realty Co.*, 93 S. W. (2d) 954 (Rec. 4-15).

IV.

SPECIFICATION OF ASSIGNED ERRORS INTENDED TO BE URGED.

The assigned errors intended to be urged may be summarized thus:

(a) The Supreme Court of Missouri erred in denying appellant's contention that to give the statute, known as the Public Service Commission Law of Missouri (Chapter 33, R. S. Mo., 1929), such force and effect that the mere filing of schedule of rates, thereunder, by appellee, a public utility company, served to abrogate the contract which appellant had for appellee's heating service, without any finding or order having been made by the Public Service Commission with reference either to such filed schedule or to appellant's contract, renders said statute repugnant to the Fourteenth Amendment to the Constitution of the United States, which provides that no state shall deprive any person of property without due process of law, and repugnant to Section 10 of Article I

of said Constitution, which provides that no state shall pass any law which impairs the obligation of contracts.

(b) The Missouri Supreme Court erred in denying appellant's contention that to give said state statute such force and effect that the mere promulgation of a schedule of rates for appellee's steam heat customers, generally, by the Public Service Commission, pursuant to the statute, served to abrogate appellant's contract with appellee for its steam heat service, although no finding or order was made by the commission with reference to said contract, and although said contract was in due time fully performed, on both sides, renders said statute repugnant to the Fourteenth Amendment to the Constitution of the United States which provides that no state shall take any person's property without due process of law, and repugnant to Section 10 of Article I of said Constitution which provides that no state shall pass any law which impairs the obligation of contracts.

(c) The contract in question was fully performed, on both sides, without let or hindrance. All rights thereunder became vested rights, prior to the institution of this suit. The judgment herein of the Missouri Supreme Court, under said circumstances, to the effect that appellant, having fully paid, according to the contract, for the service which it received solely by virtue of the contract, must yet pay more for the service than the contract required, is the taking of appellant's vested property rights without compensation and without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States.

V.

SUMMARY OF THE ARGUMENT.

(a) To hold that the mere enactment of the Public Service Commission Law of Missouri, or the mere *ex parte* act of a utility company, appellee, in filing a schedule of rates thereunder, served to abrogate appellant's contract with appellee for heating service, although the Public Service Commission made no finding or order with respect to said rate schedule, when filed, and made no finding or order with respect to appellant's contract, would render said statute repugnant to the contract impairment and the due process of law provisions of the Federal Constitution.

(b) To hold that the promulgation by the commission of a schedule of heating rates, for appellee's customers, generally, upon a hearing of which appellant was given no notice, and to which it was not a party, and in which its contract was not considered or referred to, served to abrogate appellant's contract for heating service, although it was thereafter performed, would be violative of both the contract impairment and the due process of law provisions of the Federal Constitution. Upon said hearing the commission not only made no finding that appellant's contract was unreasonable, as to it, and under the peculiar circumstances of the service to it, or that appellee should be relieved from its performance, in the interest of the public welfare, but there is neither allegation nor proof that the commission's said schedule was intended to supplant appellant's contract. And ap-

pellee proceeded to fully perform the contract, and to receive pay from appellant, according to the contract. Appellant's responsibility to pay for the service to one building, which it did not own, rested entirely upon the contract.

(c) If, as appellant contends, the legislature, by the Public Service Commission Law, did not authorize, but rather inhibited the abrogation of the contract in question, the judgment of the Missouri Supreme Court that appellant pay more than the contract required, for the service rendered solely by virtue of the contract, serves to take appellant's property without compensation, *i. e.*, without due process of law.

VI.

ARGUMENT.

A.

We desire that it be understood that this case does not present the proposition, heretofore so thoroughly settled, that the state did not have the right to abrogate a private contract with a public utility company which was entered into prior to the enactment of the Public Service Commission Law of Missouri. The proposition here is, rather, that the contract in question was not abrogated; that what was here done by the state, or its agencies, cannot be said to have sufficed to abrogate the contract in question, against the claim of protection under the Federal Constitution.

It should be further noted, at the outset, that this is not a suit in equity whereby a utility's customer is seeking to have the utility perform its contract, nor whereby the utility is seeking to be relieved from performing a contract, as detrimental to the public interest or for other reason. It is an ordinary suit at law whereby plaintiff, appellee here, after it had performed its contract, and had received full pay in accordance with the contract, seeks to recover yet more for the service which it rendered pursuant to the contract.

In 1908, when appellant made the contract in controversy, for heating service, there was no public utility or public service commission law of Missouri which af-

fected contracts between utility companies and their customers. The contract was a valid and permissible one, when made, and continued to be such, throughout its term, unless it was abrogated, in a lawful manner, by the state, in the proper exercise of its police power.

Wichita R. & L. Co. v. *P. U. Comm.*, 260 U. S. 48.
Hinkel D. G. Co. v. *Wich. Ind. Gas Co.*, 64 F. (2d) 881 (C. C. A. 10th).

In 1913 the legislature enacted what is designated as the "Public Service Commission Law of Missouri" (Chapter 33, Rev. Stat. Mo., 1929). By that act the legislature created the Public Service Commission and delegated to it the power to regulate and control public utilities and the rates to be charged for their services in the manner and to the extent prescribed by that statute. In June, 1917, appellee filed with the Public Service Commission a schedule of rates for its heating service (Rec. 45). The commission was not then asked to and did not make any finding or order whatsoever with respect to said filed schedule. Upon the face of the schedule, August 1, 1917, was named as its effective date. Appellee contends that inasmuch as said schedule was not suspended by the commission, nor any complaint lodged against it, prior to its named effective date, it then went into full force and effect; that it not only superseded prior rates for its customers, generally, that is, who had no special contracts, but that it served even to abrogate appellee's contract here in question. Appellee contends that the Public Service Commission Law (Par. 12, Sec. 5190, R. S. Mo., 1929, Vol. I, p. 1448) gave such effect

to said filed schedule. The pertinent part of said section has been set forth in the "Statement" (*ante*, pp. 3-4). The Supreme Court of Missouri upheld such contention, saying that "We hold that the contract in controversy should be deemed nugatory from and after August 31, 1917" (93 S. W. (2d) l. c. 961) (Rec. 15). That was the date named in said filed schedule as its effective date. Notwithstanding the filing of said schedule of rates appellee continued to render to appellant the heating service prescribed in said contract, and appellant continued to pay therefor, at the rates prescribed in the contract, until the contract expired by its terms, viz., on August 31, 1918. More than three years after the contract had expired, and had been fully performed, that is, on August 27, 1921, appellee instituted this suit against appellant. In the first five counts of the petition appellee seeks to recover the difference between what appellant actually paid, according to contract, and what appellee now claims that appellant should have paid, according to said filed schedule, for steam heat service from October 1, 1917, to February 28, 1918.

It has heretofore been noted that the commission made no finding or order with respect to said rate schedule, at the time it was filed. However, shortly after August 1, 1917, named as the effective date of said schedule, a number of appellee's heating customers (not including appellant) lodged a complaint against said filed schedule before the Public Service Commission. The commission had a hearing upon said complaint with the result that the commission made a finding and order that said schedule of rates was unreasonable, excessive and unlawful.

Said decision and finding of the commission was offered in evidence (Rec. 45, 46) but is not set out in the record herein, as it was stipulated that reference might be made therefor to the official reports of the commission, published as required by law (5 Mo. P. S. C. Rep. 664-683). That finding and decision of the commission was not appealed from, but was accepted and conformed to by appellee, that is, it became "final." The Public Service Commission Law provides that:

> "In all collateral actions and proceedings the orders and decisions of the commission which have become final shall be conclusive" (Sec. 5238, R. S. Mo., 1929, Vol. I, p. 1476).

Plaintiff (appellee) is, therefore, in the peculiar position of endeavoring to collect money from defendant, in counts one to five of its petition herein, by virtue of a schedule of rates which was *conclusively* established, as regards this collateral action, to be unreasonable, excessive and, therefore, unlawful, according to said plain statutory provision.

Neither appellee nor the Missouri Supreme Court question but what it was proper for the legislature to make the commission a fact finding body as to utility rates, and to make conclusive any finding which had become final, that is, from which no appeal to the courts had been taken as provided by the statute. But the Missouri Supreme Court sought to escape the effect of the statute just above quoted by noting that the Public Service Commission, in its decision upon a hearing, had after the contract in controversy had expired, as

to both steam heat and electricity rates in Kansas City (8 Mo. P. S. C. Rep. 223), had indicated, as the court deemed, that the commission as composed in 1917, had erroneously found, by reason of insufficient data before it, that said schedule of heating rates, filed in 1917, was unreasonable and excessive. As to that later decision of the commission several observations are pertinent. First, what was said in said decision was said *arguendo,* in its opinion, and not in the commission's findings or orders. The latter are found on pages 297-300 of 8 Mo. P. S. C. Reports. It is findings or orders of the commission which the statute makes conclusive, and not what the commission may say, argumentatively, in an opinion. Second, the said rate schedule, filed in 1917, was not before the commission, for consideration, at the time said later decision was rendered, and the commission made no *finding* concerning it. In the next place, the commission, as then composed, could not, if it would, nullify a finding of fact made by the commission, as composed in 1917, which finding, by virtue of the statute, had become final and conclusive, in a collateral proceeding, such as the case at bar. It might as well be argued that when a court overrules one of its former decisions it thereby nullifies the judgment in the former case, although such judgment had become final.

However, appellant does not, in this court, base its case mainly, if at all, upon the conclusive finding of fact by the commission that said schedule of rates, merely filed as aforesaid, was unreasonable and unlawful. Appellant relies, rather, upon the broader ground that to give said statute (Section 5190, R. S. Mo., 1929, Vol. I, p. 1448)

such force and effect that appellee's mere *ex parte* act of filing a schedule of heating rates, applicable to its customers, generally, served to abrogate appellant's contract, although the commission, at the time, made no finding or order with respect to said schedule, nor any finding or order with respect to appellant's contract, renders said statute repugnant to both the due process of law clause and the contract impairment provisions of the Federal Constitution.

Let it be noted that appellee never lodged any complaint before the Public Service Commission with respect to appellant's contract in question. It never sought to be relieved, by the commission, from the performance thereof, as being inimical to the public welfare, or for any reason. On the contrary, it continued to perform the contract throughout its full term, and appellant made full payment, according to contract, for the service rendered.

Another noteworthy fact is that appellant did not own all of the buildings to which heating service was rendered under this contract. The contract shows on its face (Rec. 48) that one, at least, of the buildings was owned by another party, the appellant being merely the managerial agent thereof. So, appellant was not obligated to pay for heating service to that building except by virtue of the contract in question. But, appellee continued to send steam heat to that building, as a service to appellant; continued to bill appellant for that service; continued to accept payment from appellant for that service; and continues, by this suit, to assert responsibility in appellant to pay for such service, when its responsibility, if any,

to pay rests solely upon said contract. Appellee now seeks to say that the contract was annulled as to it, but kept alive as to appellant.

The decision of the Missouri Supreme Court was: "* * * we hold that the contract in controversy should be deemed nugatory from and after August 31, 1917" (93 S. W. (2d) l. c. 961). (Rec. 15). That was the named effective date of said rate schedule which was filed with the commission on June 19, 1917 (Rec. 45), which the commission made no finding or order concerning, when filed, but which the commission later, upon a hearing, found to be unreasonable, excessive and unlawful (5 Mo. P. S. C. Rep. 664-683).

Said rate schedule was filed by virtue of Par. 12, Section 5190, R. S. Mo., 1929, the pertinent part of which has been set forth in the "Statement" herein (*ante*, pp. 3-4).

That the mere enactment of that statute, or the mere filing, thereunder, of a schedule of rates, for customers, generally, could not have the effect of abrogating appellant's contract, in the absence of any finding or order of the commission, upon an orderly hearing, with respect to the filed schedule or with respect to the contract, in view of the contract impairment and the due process of law provisions of the constitution, has been definitely settled by the authoritative decisions of this and other courts.

Wichita R. & L. Co. v. *P. U. Comm.*, 260 U. S. 48.

Hinkel D. G. Co. v. *Wichison Ind. Gas Co.*, 64 F. (2d) 881 (C. C. A.).

Attleboro Steam & El. Co. v. *Narragansett El. Light Co.*, 295 F. 895.

In re Searsport Water Co., 118 Me. 382 (108 A. 452, 458).

Kaul v. *Am. Ind. Tel. Co.*, 95 Kan. 1 (147 P. 1130).

So. Utilities Co. v. *Palatka*, 268 U. S. 232.

Jefferson Deposit Co. v. *Central Ill. Light Co.*, 309 Ill. 262; 140 N. E. 817.

In the case of *Wichita Rd. & Light Co.* v. *Public Utilities Comm. of Kansas*, 260 U. S. 48, above cited, a utility company had a private contract as to rates with a certain consumer. The company filed a schedule of rates with the utility commission, higher than such contract rates, and petitioned the commission for an order putting into effect such schedule, as to all consumers. The commission, after a hearing in which the consumer, having the contract, intervened, allowed the petition and ordered that the filed schedule go into effect. The consumer having said contract, brought suit in the federal court to enjoin the commission from putting the order and schedule into effect as to it, asserting protection of its contract under the Federal Constitution. It was urged that the order made by the commission was not effective to put the schedule in effect, in lieu of the contract rates, because the commission did not make a direct finding that the contract rates were unreasonable, as to the contract customer. The utility company fell back upon the contention that the mere filing of the schedule with the commission was sufficient, under Section 20 of the Kansas Public Utility Act, to put the schedule in effect in abrogation of

the contract rates, without any finding by the commission. The court denied that contention, and held that the mere passage of the Public Utility Act, or the mere filing, thereunder, of a rate schedule was not sufficient to abrogate a contract.

If the suggestion be made that said decision was based upon the peculiar statutes of Kansas, there are at least two answers thereto. In the first place, the sections of the Kansas statute, referred to in the court's opinion, are strikingly similar in language, and identical in substance, with the corresponding sections of the Missouri Public Service Commission Act, to-wit, Sections 5190 (5) and (12), 5191, 5230 and 5231, Rev. Stat. Mo., 1929. In the second place, this court made it very clear that its decision, in said Wichita case, was not based particularly upon the Kansas statutes, but upon principles of constitutional law. In the opinion, the court said:

> "This conclusion accords with the construction put upon similar statutes in other cases (citing cases). Moreover, it accords with general principles of constitutional government."

In the later cases of *Mahler v. Eby*, 264 U. S. 32, and *Panama Refining Co. v. Ryan*, 293 U. S. 447 (1934), the court refers to said Wichita case and reiterates that "We put this conclusion not only on the language in the statute, but also on principles of constitutional government."

In the case of *In re Searsport Water Co., supra*, the Maine Supreme Court says:

> "A utility cannot repudiate such a contract at will. Nor does the filing of new schedules under

Section 28 have the effect of changing the rates fixed by contract. To obtain a change in such rates, except, of course, by mutual consent, and with approval of the Utilities Commission, the utility should proceed under Section 50 of Chapter 55, and first obtain a finding by the Utilities Commission that the rates and charges fixed in such contract are 'unjust, unreasonable or insufficient,' whereupon the commission may then substitute such rates as it shall deem to be just and reasonable in the premises."

In the case of *Jefferson Deposit Co.* v. *Central Ill. Light Co.*, 309 Ill. 262, 140 N. E. 817, the Supreme Court of Illinois says:

"It is apparent from the record that the appellee has never filed complaint or petition alleging that its contract with the appellant is unjust, unreasonable, or discriminatory. While it is true that it is stated in its notice concerning its petition to withdraw its flat-rate schedule that it desired to put all steam consumers on a meter basis, and while the order of the commission allowing the withdrawal of the flat-rate schedule states that all consumers of steam shall be put on a meter rate basis, yet it is apparent from the petition and the proceedings before the commission that no consumers were contemplated other than those on a flat-rate schedule, which rate was determined by the number of square feet in the building in which the steam was used. Such basis of rate has no reference to or bearing on the appellant's contract, which is a lump sum contract. No evidence was offered on either of the appellee's petitions that in the slightest degree touched on the question of the reasonableness of the appellant's contract or whether or not it was discriminatory. * * * It is not within the legal contemplation of the Public Utilities Act that contracts may be set aside by inference, nor that the commission shall have power to do so as an incident to a proceeding on a petition

seeking a different relief. The petition of the appellee and its position taken before the commission were that it be allowed to withdraw its flat-rate schedule. Its notice to the public that it desired to put all steam users on a meter basis was based on its petition to withdraw its flat-rate schedule, and was not such as required the appearance and objection of the appellant, for the reason that its contract was not on a flat-rate basis. While the order of October 30, 1918, made by the commission, temporarily increased meter rates and in terms was made applicable to all consumers of steam in the City of Peoria, it is clear that, if the words 'all consumers' were intended to cover other than meter or flat-rate consumers, the order in that particular was void, as the commission had no authority to make its order applicable to consumers who held contracts under the nonschedule rate filed, unless there had been a hearing and finding that the appellant's contract was unjust and unreasonable by the proceeding provided for by the act. While the intention of the act is to prevent discrimination in rate charges, it provides the method by which contracts may be abrogated, and their validity cannot be attacked in any other way. Such contracts were not, as contended by the appellee, destroyed by the passage of the act. At the time the appellant filed its complaint for reparations its contract had not been abrogated."

We may concede that the contract in controversy was entered into subject to the right of the state to abrogate it, in a lawful manner, if it should be found, on a hearing before a competent tribunal, that the performance of it would be inimical to the public welfare. The contract, although subject to the condition of being abrogated, as aforesaid, was a property right which could not rightfully be taken away without due process of law. And the very essence of due process is notice and a hearing.

Both were conspicuously absent in the present instance. In the opinion in this case the Missouri Supreme Court said:

> "Under the construction our court has placed upon our statute authorizing substituted rates for existing rates, the statute does not require any finding of facts or the making of any order as a condition precedent to the validity of plaintiff's schedule of 1917 and its effectiveness as of August 31, 1917" (93 S. W. (2d) l. c. 960, Rec. 13).

If said court has correctly construed said statute there can be no question, we submit, but that the statute undertakes to abrogate contracts, to take away property rights, without due process of law. Such is the express holding of this court, in the *Wichita Case, supra,* of the Circuit Court of Appeals, Tenth Circuit, in the *Hinkel Dry Goods Co: Case, supra,* and of other courts, in the cases hereinabove cited.

B.

What has been said in the preceding point of this argument pertains, in the main, to counts one to five of appellee's petition herein, wherein it seeks to recover by reason of the rate schedule which it filed with the commission in June, 1917. When the commission, on February 11, 1918, found, after a hearing upon a complaint filed, that said schedule of heating rates was unreasonable, excessive and unlawful, the commission, itself, then promulgated a schedule of rates for heating service, effective March 1, 1918 (Rec. 45, 46, 5 Mo. P. S. C. Rep. l. c. 683). In the last six counts of its petition appellee seeks to recover the difference between what appellant paid, ac-

cording to contract, and what appellee now claims that appellant should have paid, according to the commission's said schedule, from March 1 to August 31, 1918.

Appellant was not a party to the proceeding before the commission, just mentioned. Its contract here in question was not considered or referred to in that proceeding (5 Mo. P. S. C. Rep. 664-683). There is neither allegation nor proof, in the case at bar, that said schedule of rates, promulgated by the commission, purported to or was intended to cancel appellant's said contract. Appellee did not ask the commission to inquire concerning appellant's contract, to find whether or not it was unreasonable or subvertive of the public interest, or to order that appellee desist from furnishing heat to appellant in accordance with the contract. On the contrary, appellee continued to furnish heat to appellant until the contract expired by its terms, and appellant paid therefor in full, according to contract.

Certain it is that there was never any finding by the commission, the only tribunal which was competent to make such a finding, that the performance of this contract was or would be detrimental to the public welfare. And there is neither allegation nor proof, in the case at bar, that appellee was required to or did falter, in the least, in rendering its service to the general public by reason of the fact that it was performing appellant's contract, and was being paid only in accordance with its terms. The contract was performed, and there is nothing in the record here which indicates that the public interest was injuriously affected

thereby. If appellee should recover in this case there is no reason to believe that it would distribute the amount of its recovery among the public or among those who were its steam heat customers during the time in question.

Injury to the public welfare is a *sine qua non* for the abrogation of such a contract by a state.

Arkansas Nat. Gas Co. v. *Ark. Rd. Comm.*, 261 U. S. 379.

Ohio & Colo. Smelt. & R. Co. v. *P. U. Comm.*, 68 Colo. 137; 187 P. 1082.

In the first case above cited, this court said:

> "The power to fix rates, when exerted, is for the public welfare, to which private contracts must yield; but it is not an independent legislative function to vary or set aside such contracts, however unwise and unprofitable they may be. *Indeed, the exertion of legislative power solely to that end is precluded by the contract impairment clause of the constitution.* The power does not exist *per se.* It is the intervention of the *public interest* which justifies, and at the same time, *conditions, its exercise*" (italics ours).

In the well-considered case, last above cited, the Supreme Court of Colorado says:

> "The *sole reason* for holding that the power rests with the commission to increase or decrease a rate stipulated in a contract, and that the exercise of such a power is not an infringement of the constitutional inhibition against the impairment of a contract obligation, and likewise the guarantee of due process of law, is that the *public welfare* demands it in the specific case. Therefore the *commission,* with the delegated legislative power of the state, *must determine that the rate fixed in the contract is detrimental to the public weal.* This is the exercise of a

very grave and dangerous power, and should be asserted with the greatest caution, and by means of every instrumentality at the command of the commission, to determine with reasonable certainty that the rate fixed in the contract injuriously affects the public welfare. It is not as if the commission were to establish a rate in the first instance, as based upon its own judgment as to reasonableness, but it *must first determine* that a contract in this respect, between persons engaged in the particular business and presumably well advised as to its probable effect, not only at the time, but in the light of future conditions, is so unreasonable as to be *detrimental to the public interest*'' (italics ours).

If appellee considered that, for any valid reason, it should not perform this contract it should have made complaint thereof to the Public Service Commission, and had a hearing and finding in regard thereto. But there is no evidence that this contract was even filed with the commission, or otherwise brought to its attention. As the contract was being performed the appellant herein certainly had no reason to appear before the commission with reference thereto.

It has heretofore been noted that appellant did not own one of the buildings for which steam heat service was furnished under this contract, as appears from the face of the contract (Rec. 48). Nothing in the record here indicates that appellant was obligated to take or to pay for heating service to said building except by virtue of said contract. It never ordered nor requested the service except by the contract. Nothing in the record indicates that appellant requested such service, under the schedule in question, or that it obligated itself to pay for heat furnished that build-

ing by reason of or at the rates fixed by the commission, in the schedule which it put into effect. If the promulgation of that schedule abrogated the contract in controversy, then appellant's responsibility to pay for heat, at least for said building, ceased. In prosecuting this suit the appellee is seeking to hold appellant responsible under the contract, as if in force, while it maintains that the contract was annulled as to itself. If appellee had procured the abrogation of this contract, in a lawful way, who can say that appellant would have continued to take and to make itself responsible for heat for the building which was owned by Laura Minor (Rec. 48)? Or, who can say that either Laura Minor or appellant would have taken steam heating service, for their respective buildings, from appellee, if they had been required to pay at the rates fixed in the schedule promulgated by the commission?

In enacting the Public Service Commission Law of Missouri the legislature did not undertake to itself abrogate private contracts with public utility companies. The legislature merely delegated to a commission the power to deal therewith. The commission, rather than the courts, was given the power to make all findings of fact with respect to all public utility rates.

Cape Girardeau v. *St. L., etc., R. Co.*, 305 Mo. 590, 605.

N. P. Ry. Co. v. *Solum*, 247 U. S. 477, 484.

It was for the Public Service Commission to find the question of fact as to whether or not the rates

prescribed in the contract here in question, for the particular service to be rendered appellant, were so unreasonable as to be detrimental to the public welfare. But the commission did not make such a finding, and could not lawfully make such a finding of fact except upon a hearing, upon notice, with respect to the contract.

To say that the commission was authorized to make a finding and order to that effect, without an orderly procedure, that is, without notice and a hearing, would render invalid the Public Service Commission Law, as being a pure delegation of legislative power.

Wichita Rd. & L. Co. v. *P. U. C.*, 260 U. S. l. c. 59.

It may be urged that the commission did have a hearing, and did decide, upon a hearing, that the heating rates prescribed in its schedule promulgated on February 11, 1918, effective March 1, 1918 (Rec. 46, 5 Mo. P. S. C. Rep. 683), were reasonable and proper; that such rates were higher than those prescribed in the contract in question; that, therefore, the commission found, by implication, that the contract rates were not reasonable and proper.

Against that suggestion we say, first, that this court, in the *Wichita Rd. & L. Co. Case, supra,* l. c. 59, held that a finding by implication was insufficient, in such a matter. The decision in *Jefferson Deposit Co.* v. *Central Ill. Light Co.*, 309 Ill. 262, 140 N. E. 817, is to the same effect. In that case the court says:

> "It is not within the legal contemplation of the Public Utilities Act that contracts may be set aside by inference, nor that the commission shall have power to do so as an incident to a proceeding on a petition seeking different relief."

In the second place, the finding was not binding upon appellant, who had no notice of and was not a party to that hearing. Thirdly, from the finding that a certain schedule of rates was reasonable, as to the utility company and its customers, generally, it did not follow that appellant's contract rates were unreasonable, as to it, or so much so that the performance of the contract would be injurious to the public welfare.

We submit that, under the circumstances disclosed by the record herein, to require appellant to now pay, for the service it contracted for, more than it contracted to pay, would indeed be the taking of its property without justification of law, and without due process of law.

C.

The Missouri legislature, by its Public Service Commission Law, did not authorize the abrogation of the contract in controversy.

Heating service and heating companies were, apparently, overlooked in the original draft of the "Public Service Commission Law." So, Section 105a was inserted at the end of Article V, which relates to telegraph and telephone corporations (Laws of Mo., 1913, p. 637; Sec. 5228, R. S. Mo., 1929, Vol. I, p. 1470) By that section all the provisions of the act relating to railroad, gas, electrical, water, telephone and tele-

graph companies, "so far as the same shall be practically, legally or necessarily applicable to heating companies in this state, *are hereby made applicable to such heating companies,* as designated in this act, and shall have *full application thereto*" (italics ours).

Turning to Section 87, Par. 4 of Article V of the Act (Laws, 1913, p. 621, Par. 4, Sec. 5208, R. S. Mo., 1929, Vol. I, p. 1459), relating to telegraph and telephone companies, which by Section 5228, above quoted, is expressly made applicable to heating companies, we find this provision:

> "Nothing in this act shall be construed to prevent any telegraph corporation or telephone corporation (or heating company) from continuing to furnish * * * service under any contract or contracts in force at the date *this article takes effect* or upon the *taking effect of any schedule or schedules of rates subsequently filed* with the commission, as hereinafter provided, *at the rates fixed in such contract or contracts*" (italics and matter in parenthesis supplied).

Thus, by virtue of the statute itself, plaintiff's claim fails, that it *must* charge defendant according to the filed schedule; that it was *prevented* by the statute from charging other than the rates named in the filed schedules. Note again the statute: "Nothing in this act shall be construed to prevent any (heating company) from continuing to furnish * * * service * * * at the rate or rates fixed in such contract or contracts." This provision of the act served to save and keep in effect heating contracts which were in effect

when the act was passed, or which were in effect when a schedule of rates was filed or issued. It certainly did so in the absence of a finding and order of the commission, upon a hearing, that appellee should, for the public interest, desist from performing the contract.

The state asserts and exercises rights under its police power solely through its legislature. The state *always* had the *right* to exercise its police power with respect to matters affected by the Public Service Commission Act. But if never exercised such power until the legislature spoke. The state could exercise the powers which it had, in such matter, at great length or in a limited way, in the judgment and discretion of the legislature. And, if the legislature saw fit to have the statute not apply to heating service under a contract "in force at the date this article takes effect or upon the taking effect of any schedule of rates subsequently filed," it was within the province of the legislature so to provide. And the legislature did do so here in very plain language.

That provision of the statute, which preserved defendant's existing contract for heat service, is applicable to the issues both upon counts one to five and upon counts six to eleven of the petition herein.

This court upheld and gave effect to a somewhat similar provision of the statutes of Arkansas, which empowered the railroad commission to fix and regulate public utility rates, but provided that the commission,

"shall have no jurisdiction or power to modify or impair any existing contracts for supplying gas to persons, firms," etc.

Arkansas Nat. Gas Co. v. *Ark. Rd. Comm.*, 261 U. S. 379; 67 L. Ed. 705.

The Missouri Supreme Court does not, in its opinion herein, question but that Paragraph 4, Section 5208, above quoted, which preserved existing contracts, was "practically, legally or necessarily applicable to heating companies" (to quote from Section 5228, *supra*). That Honorable Court, after citing several of its former decisions which hold, so it says, that, upon the passage of the Public Service Commission Law, all contracts, as to rates, with public utility companies, expired, *ipso facto*, disposed of appellant's contention, that said Section 5208 preserved, inviolate, its contract, thus:

"So, in the light of our decisions, *supra*, we have no hesitancy in reaffirming that the statute purporting to preserve existing contracts does not operate to exempt such contracts from the scope of the exercise of the police power of the state to protect or promote the general or public welfare by regulating rates of public utilities so as to raise or lower, as the case may be, previously existing contract rates" (93 S. W. (2d) l. c. 959, Rec. 11).

The court speaks of "*reaffirming* that the statute purporting to preserve existing contracts does not operate," etc., although, as a matter of fact, said Section 5208, and its effect, had not been considered or referred to in any prior decision of that court. It will be noted that the court does not question but that the "purport" of the statute was "to preserve existing contracts." Just

why the court concludes that the statute does not do what it purports to do, that is, what it was intended by the legislature to do, we are not able to discover from the court's language. The court recognizes the clear meaning of what the legislature said, but we infer that the court feels that the legislature ought not to have said it. The court seems to think that the legislature, by said Section 5208, had somewhat abridged the police power of the state, that is, had failed to exercise the police power to its fullest possible extent. However, there can be no question but that it was for the legislature and not the court to determine the extent to which the police power of the state should be exercised. If the legislature saw fit to "preserve existing contracts," which the court says was the purport of the statute, such was within the rightful and exclusive province of the legislature.

Farmers & M. Bk. v. *Fed. Reserve Bk.*, 262 U. S. 649.

Central Lumber Co. v. *So. Dakota*, 226 U. S. 157.

Lindsley v. *Nat. Carbonic Gas Co.*, 220 U. S. 61.

It is admitted that appellant paid all that it was required by the contract to pay for the heat service rendered (Rec. 41, 47). It is plain, therefore, that appellant may not rightfully be required to pay more for said service unless the contract was abrogated. If the contract was not annulled, then the judgment of the Missouri Supreme Court that appellant pay a sum in excess of the contract price, for the service rendered pursuant to the contract, deprives appellant of its property without giving to it anything in return. And, for the state to take

appellant's property without compensation is to deprive it thereof without due process of law. In *Holden* v. *Hardy*, 169 U. S. 366, this court said:

> "Recognizing the difficulty in defining, with exactness, the phrase 'due process of law,' it is certain that these words imply a conformity with natural and inherent principles of justice, and forbid that one man's property, or right to property, shall be taken for the benefit of another, or for the benefit of the state, without compensation."

The state may violate the Fourteenth Amendment to the Federal Constitution through the agency of a court, as well as through the agency of its legislature.

C., B. & Q. R. Co. v. *Chicago*, 166 U. S. 226.

In the case just cited, this court said:

> "It is not contended, as it could not be, that the Constitution of Illinois deprives the railroad company of any right secured by the 14th Amendment. For the state constitution not only declares that no person shall be deprived of his property without due process of law, but that private property shall not be taken or damaged for public use without just compensation. But it must be observed that the prohibitions of the amendment refer to all the instrumentalities of the state, to its legislative, executive, and judicial authorities, and, therefore, whoever by virtue of public position under a state government deprives another of any right protected by that amendment against deprivation by the state, 'violates the constitutional inhibition; and as he acts in the name and for the state, and is clothed with the state's power, his act is that of the state.' This must be so, or, as we have often said, the constitutional prohibition has no meaning, and 'the state has clothed one of its agents with power to annul or evade it.' *Ex parte Virginia*,

100 U. S. 339, 346, 347 (25: 676, 679); *Neal* v. *Delaware*, 103 U. S. 370 (26: 567); *Yick Wo* v. *Hopkins*, 118 U. S. 356 (30: 220); *Gibson* v. *Mississippi*, 162 U. S. 579 (40: 1078). These principles were enforced in the recent case of *Scott* v. *McNeal*, 154 U. S. 34 (38: 896), in which it was held that the prohibitions of the 14th Amendment extended to 'all acts of the state, whether through its legislative, its executive, or its judicial authorities'; and, consequently, it was held that a judgment of the highest court of a state, by which a purchaser at an administration sale, under an order of a probate court, of land belonging to a living person who had not been notified of the proceedings, deprived him of his property without due process of law contrary to the 14th Amendment."

If it be urged that the Missouri Supreme Court did not take appellant's vested rights in this contract "without due process of law," because appellant had a hearing, in due course, in that court, in the case at bar, the answers are several. First, the question as to whether or not this contract should be abrogated, that is, whether or not appellee should be relieved from its performance, in the interest of the public weal, was not made an issue and could not have been made an issue in this case. It was not a judicial question. Second, the contract had been fully performed when this suit was instituted, and whether or not it ought to be performed had become a mere moot question. Neither court, commission nor legislature could abrogate the contract, that is, relieve appellee from performing it, after it had been performed, and had expired. Third, merely because the Missouri Supreme Court went through the regular form of a trial or hearing of this case it does not follow that it did not, by its judgment, deprive appellant of its property without due process

of law. On that proposition this court, in the case last above cited, ruled thus:

> "Nor is the contention that the railroad company has been deprived of its property without due process of law entirely met by the suggestion that it had due notice of the proceedings for condemnation, appeared in court, and was admitted to make defense. It is true that this court has said that a trial in a court of justice according to the modes of proceeding applicable to such a case, secured by laws operating on all alike, and not subjecting the individual to the arbitrary exercise of the powers of government unrestrained by the established principles of private right and distributive justice—the court having jurisdiction of the subject matter and of the parties, and the defendant having full opportunity to be heard—met the requirement of due process of law. *United States* v. *Cruikshank,* 92 U. S. 542, 554 (23: 588, 592); *Leeper* v. *Texas,* 139 U. S. 462, 468 (35: 225, 227). But a state may not, by any of its agencies, disregard the prohibitions of the 14th Amendment. Its judicial authorities may keep within the letter of the statute prescribing forms of procedure in the courts and give the parties interested the fullest opportunity to be heard, and yet it might be that its final action would be inconsistent with that amendment. In determining what is due process of law regard must be had to substance, not to form. * * * If compensation for private property taken for public use is an essential element of due process of law as ordained by the 14th Amendment, then the final judgment of a state court, under the authority of which the property is in fact taken, is to be deemed the act of the state within the meaning of that amendment."

Missouri Cases Considered.

The Supreme Court of Missouri rules the instant case upon the authority of certain of its previous decisions which are said to declare that, upon the enactment of the Public Service Commission Law, all private contracts for utility rates became, *ipso facto,* null and void. The court failed to note that in each of the cases cited, with possibly one exception, where a contract was involved, the matter of the contract, and its performance, had come, first, before the public service commission, where, with the affected parties present, there had been a hearing and a finding with respect to the contract. The cases referred to are: *State ex rel. Sedalia* v. *P. S. C.,* 275 Mo. 201; *City of Fulton* v. *P. S. C.,* 275 Mo. 67; *State ex rel. Washington Univ.* v. *P. S. C.,* 308 Mo. 328. Our chief cause of complaint here is the absence of the essential things which were present in the cases cited, to-wit, a hearing, on notice, and a finding by the commission with respect to the contract. The possible exception noted is that of the case of *K. C. Bolt & Nut Co.* v. *K. C. L. & P. Co.,* 275 Mo. 529. That case was affirmed, on appeal, by this court: 252 U. S. 571. In that case, however, the sole contention urged by plaintiff (appellant) was that the state did not have the right and power to abrogate a contract which was entered into prior to the passage of the Public Service Commission Law. No such contention is made in the case at bar. In said Bolt & Nut Co. case no complaint was made on the ground that there had been no hearing or finding by the commission, and, apparently, there had been a proper hearing and finding by the public

service commission, for the Missouri Supreme Court, on page 532 of its opinion, says:

> "On April 17, 1917, the public service commission, proceeding in conformity with the provisions of the Public Service Commission Act, after a valuation was made and *full hearing had*, made an order establishing a schedule of rates which the defendant company should be permitted to charge for electric energy at Kansas City, Missouri" (italics ours).

It thus appears that the previous Missouri cases, cited in the instant case, are not pertinent to the propositions here raised. In any event, they are not controlling upon this court in so far as they affect questions arising under the Federal Constitution.

Conclusion.

The case boils down to this. The Missouri Supreme Court could not, in the case at bar, abrogate the contract in controversy. The legislature did not itself directly abrogate the contract, by the utility act. If the legislature, by reason of the saving clause of Section 5208, above mentioned, preserved this contract and did not authorize its abrogation, by virtue of the Public Service Commission Law, then the contract remained in full force, throughout its term, and the judgment of the court that appellant pay more than was required by contract deprives appellant of its property without compensation, *i. e.*, without due process of law. Even if said Section 5208 did not save the contract from being abrogated under the provisions of the Public Service Commission Law, it remained in force until abrogated by due process of law, that is, by an orderly procedure before the Public Service Com-

mission. There could be no such procedure, absent a hearing, after notice to appellant, and a finding by the commission that the performance of the contract would be *detrimental to the public interest.* If, as this Honorable Court says, the intervention of the public interest alone justifies and also conditions the exercise of the police power toward the abrogation of a contract, the fact of the intervention of the public interest must, assuredly, be established by a finding of competent authority, viz., by the commission, before the contract could be lawfully or effectually abrogated. The contract in controversy was performed, and there was never any lawful finding that the public weal would or did suffer thereby.

For each and all of the reasons above stated the judgment of the Honorable Supreme Court of Missouri, both upon the first five counts and upon the last six counts of the petition, should be reversed.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1936.

No. 217.

MIDLAND REALTY COMPANY, APPELLANT,

VS.

KANSAS CITY POWER & LIGHT COMPANY, APPELLEE.

APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSOURI.

REPLY BRIEF FOR APPELLANT.

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REPLY BRIEF FOR APPELLANT.

1.

The first contention of appellee, in its brief herein, is that the contract in controversy was not such a property right as to be protected by the due process of law clause of the Federal Constitution. It says that such is true because Section 5, Article XII, of the Missouri Constitution, provides that "The exercise of the police power of the state shall never be abridged."

Appellee does not correctly or fully quote said constitutional provision, nor give its context. The section referred to occurs in the article of the Constitution of 1875 devoted to corporations. The full provision is as follows:

> "The exercise of the police power of the State shall never be abridged, or so construed as to permit corporations to conduct their business in such manner as to infringe upon the equal rights of individuals or the general well-being of the State."

Prior to 1875 the state constitution did not contain that or similar provision. Said provision of the constitution has been authoritatively construed by the Supreme Court of Missouri, *in banc*, in *State* v. *Railroad*, 242 Mo. 339 (1912), thus:

> "In 1875, that part of our Constitution relating to corporations was revised, and the following clause was added thereto:
>
> 'Sec. 5, Art. XII. The exercise of the police power of the State shall never be abridged, or so construed as to permit corporations to conduct their business in such manner as to infringe upon the equal rights of individuals or the general well-being of the State.'
>
> We cannot see that the foregoing enactment materially changed or enlarged the general police power as it had existed from the creation of our State. It was merely a constitutional declaration that the police power shall not be *construed* so as to exalt the rights of corporations above those of natural citizens or so as to disturb the general well-being of the State."

Under that authoritative decision of the Supreme Court *in banc*, construing Section 5, Article XII, of the

state constitution, which decision the court, in division, could not overrule, said section of the constitution has no particular bearing on the case at bar.

2.

Speaking of the effect claimed for said Section 5, Article XII of the Missouri Constitution, counsel for appellee, on page 18 of their brief, say:

> "And said rates becoming inoperative and unenforceable by virtue of the exercise of the State's prior, reserved right of the police power they ceased to be private contract rights. Therefore, when they are not private contract rights they cannot be impaired, and, not being contract rights, they certainly cease to be property rights subject to the protection of due process."

If counsel mean to say, merely, that the contract in controversy, when made, was subject to abrogation under the police power we will not differ with them. We frankly concede that the contract could have been abrogated, by the exercise of the police power in accordance with due process of law. If counsel mean to assert that this contract was not a good contract, and not a property right, until duly abrogated, simply because it was always subject to abrogation, we note that it has been authoritatively decided to the contrary.

So. Utilities Co. v. *City of Palatka,* 268 U. S. 232.
Hinkel D. G. Co. v. *Wich. Ind. Gas Co.,* 64 F. (2d) 881 (C. C. A.).

In the case first above cited this court, speaking through Mr. Justice Holmes, says:

> "The Supreme Court (of Florida) held that the city had power to grant the franchise and to make the contract, and that it had no power, of its own motion, to withdraw, but it concedes the unfettered power of the legislature to regulate the rates. On that ground the defendant contends that there is a lack of mutuality, and therefore that it is free, and cannot be held to rates that, in the absence of contract, it would be unconstitutional to impose. The argument cannot prevail. Without considering whether an agreement by the company in consideration of the grant of the franchise might not bind the company in some cases, even if it left the city free, it is perfectly plain that the fact that the contract might be overruled by a higher power does not destroy its binding effect between the parties when it is left undisturbed."

Since the contract in controversy was a binding one so long as it was "left undisturbed" it was a property right. Being such it could not be disturbed or taken away without due process of law. Assuming, without conceding, that the legislature might itself have abrogated the contract by direct action, such was not done here. No one claims that the Public Service Commission Law has any provision to the effect that "all existing contracts with public utilities are hereby abrogated." If this contract was abrogated it was by virtue of a delegated authority. To say that it could be abrogated by the mere filing of a schedule of rates by appellee would be to say that authority was delegated to appellee to abrogate the contract at its discretion and by its mere, *ex parte,* act. And, since this court says, in speaking of the exercise of the police power, "It is the intervention of the public interest which justifies, and at the same time, *conditions*

its exercise" (*Ark. Nat. Gas Co.* v. *Ark. Rd. Comm.*, 261 U. S. 379), to permit this utility company to abrogate the contract, by the mere filing of a schedule, would be to permit it to determine the fact of the intervention of the public interest. This "*reductio ad absurdum*" should alone demonstrate the unsoundness of the contention that the mere filing of a schedule by appellee sufficed lawfully to deprive appellant of its property right in this contract.

3.

Appellee, on page 21 of its brief, says:

> "It is common knowledge and an accepted fact of which this court will take judicial notice that all Public Service Commissions as well as the Interstate Commerce Commission have technical staffs of rate experts who carefully examine all filed rates by utilities as to their reasonableness before they are allowed to go into effect at the effective date, and that if there is any question as to their reasonableness a suspension order is issued and the rate suspended pending a hearing. Such commissions pass upon rates not only by a hearing, but by examination of filed rates pending their effective date."

We do not agree that this court may assume that the commission examined said schedule, on its being filed, and that the commission did not suspend it, within thirty days, because it was considered reasonable and lawful, and that the commission thus, tacitly, approved the schedule. The Missouri Commission, like other commissions, expressly repudiates the suggestion that it may be deemed to have approved any rates "excepting those which are made under its express orders."

Ind. Brewing Co. v. *Ry. Co.*, 4 Mo. P. S. C. l. c. 623.

Parlin & O. Co. v. *Rd.*, P. U. R. 1915A, 460 (La.).

Re N. Y. Steam Co., P. U. R. 1918B, 866 (N. Y.).

Ark. Fuel Co. v. *Rd. Co.*, 16 I. C. C. 95.

Poor Grain Co. v. *R. R. Co.*, 12 I. C. C. 418.

Coomes v. *Ry. Co.*, 13 I. C. C. 192.

In the case first above cited the Missouri Commission says:

> "Another defense urged is that by reason of the filing and publication of the rates, they have been approved by this commission. The power to publish rates is largely with the carriers and while the rates from Leadwood and the other points involved have been duly published, that alone carries with it no indication that the legal rate has been published. * * * The commission does not approve any rates, excepting those which are made under its direct orders; and the commission could not, of course, by its order impart validity to a rate which is prohibited by the constitution and the laws of this state."

The other commission decisions, above cited, are to the same effect.

Furthermore, our utilities act expressly denies any right in the commission to make a finding or order by silence or by implication. Section 5240, R. S. Mo., 1929, provides that "Every order, authorization or certificate issued or approved by the commission under any provision of this chapter shall be in writing and entered on the records of the commission."

That proviso of the act completely destroys the suggestion that the commission made, by implication, an order

that the contract in controversy was unreasonable, or an "authorization" for appellee to desist from performing it.

4.

The only finding or order the commission ever made concerning said schedule, filed in June, 1917, was as follows:

> "Ordered: 1. That the rates and prices now charged (referring to said schedule) by the defendant for steam heating service at Kansas City, Missouri, are unjust and unreasonable, and that said rates and prices are unreasonably high" (5 Mo. P. S. C., p. 682).

That finding and order was not appealed from and so became final. And, by virtue of Section 5238, R. S. Mo., 1929, said finding and order became conclusive, in this collateral action. In other words, said filed schedule was nullified. It was found not to be a lawful schedule. It was declared to be nil. The matter stands, therefore, as if said schedule had never been filed. How can such a schedule be made the basis of the cause of action attempted to be asserted in the first five counts of the petition herein?

Appellees says that because the commission, in a decision rendered several years later (8 Mo. P. S. C. 223), may have expressed the opinion, *arguendo,* that the commission, as composed in 1917, had mistakenly found said schedule to be unreasonable and unlawful, the former express and official finding and order of the commission, which was in writing (5 Mo. P. S. C. 682) and

entered of record, as the law provides (Sec. 5240, R. S. Mo., 1929), should not be accepted as conclusive, even though the statute declared it to be such. Whatever opinion the commission, as later composed, may have expressed about the finding of the commission, as composed in 1917, it is certain that the commission, in the later decision, did not make any lawful finding or order, or any at all, with respect to the schedule in question, filed in 1917. The only findings and orders of the commission in said later decision are found on pages 297-300, 8 Mo. P. S. C. Reports. It is equally certain that the commission, in said later decision, did not even attempt to resurrect, to reinstate or to validate the schedule which had been officially declared to be nil.

Even though it can be said that in the later decision (8 Mo. P. S. C. 223) the commission made a finding which had the force and effect of a law, or that was equivalent to the enactment of a law, the complete answer is that the Missouri Constitution (Sec. 15, Art. II) forbids the enactment of a law "retrospective in its operation." In *Gast R. & I. Co.* v. *Schneider*, 296 Mo. 687, the first syllabus, fully supported by the opinion, is as follows:

> "The constitution inhibits the enactment of any law 'retrospective in its operation,' and a retrospective statute is one which * * * takes away or impairs any vested rights * * *; one which creates a new ground for the support of an existing action * * *."

Appellee's cause of action, if any, in the first five counts of the petition arose in March, 1918. If appellee had then brought suit, as it might have, based upon the schedule filed June 19, 1917, and had tried the suit at once, it must have failed by reason of the finding and order of the commission, rendered February 11, 1918 (5 Mo. P. S. C. 664), nullifying said schedule. Therefore, appellee does and must depend, in order to recover herein, upon a finding in the decision of the commission rendered in 1919 (8 Mo. P. S. C. 223), after the contract in question had been performed and had expired. In other words, appellee must not only show that said later decision, as being the enactment of a law, undertook to make a finding, validating the said schedule of 1917, but appellee must escape the constitutional inhibition against a retrospective law, which is defined as "one which takes away or impairs any vested right acquired under existing laws," or as "one which creates a new ground for the support of an existing action."

As before stated, appellee's cause of action, if any, existed prior to the commission's decision of 1919 (8 Mo. P. S. C. 223). To depend upon a finding in that decision is to rely upon an enactment "which creates a new ground for the support of an existing action," which the constitution inhibits. Said later decision of the commission can have no potency in this case.

5.

The Case of Wichita Rd. & L. Co. v. P. U. Comm., 260 U. S. 48.

Appellee insists that the *Wichita Case, supra,* is not in point because "The decision was based upon a Kan-

sas statute wholly unlike Missouri's" (Brief for Appellee 29). The Kansas statutes referred to in the Wichita case are, first, Sections 13 and 16 of the Public Utility Act (Rev. Stat. Kan., 1923, Chapter 66, Secs. 110, 113). Said sections provide that "upon such hearing and investigation" the commission may promulgate rates. It is further provided that all orders and decisions of the commission, affecting rates, "shall be reduced to writing," etc. Said sections correspond to Sections 5190 (5) and 5191, Rev. Stat. Mo., 1929.

In the Missouri statutes, as in the Kansas statutes, in *every* instance, without exception, where the commission is authorized to make a finding or order concerning utility rates the statute provides that the same may be done only "after a hearing," or "after a full hearing," or "after due hearing."

An examination of the said Kansas and Missouri statutes above referred to will disclose that they are practically alike in substance. Appellee does not point out any essential difference.

The third section of the Kansas statutes referred to in the Wichita case is Section 20 of the Utility Act (Rev. Stat. Kan., 1923, Ch. 66, Sec. 117). That is the section which permits a utility to itself file a schedule of rates. The corresponding Missouri statute is Section 5190, Paragraph 12, R. S. Mo., 1929. The only substantial difference between the two statutes is that the Kansas statute does not permit a filed schedule, which changes rates, to go into effect "without the consent of the commission." The said Missouri statute has no such proviso. So, it will be seen that the Missouri statute

is less favorable to the contention of appellee here than is the Kansas statute. It appears in said Wichita case that there was at least an order of the Kansas Commission consenting that the schedule, there in question, be filed and go into effect. No order whatsoever was made by the Missouri Commission concerning the schedule here in question. As this court concluded that a schedule filed with the consent and upon the express order of the commission did not suffice to abrogate the contract in question in the Wichita case, how can it be argued that the mere filing of the schedule, here in question, without any order at all of the commission, deprived appellant of its contract in accordance with due process of law? We again hazard the statement that the ultimate conclusion reached by this court, in said Wichita case, was based mainly "on principles of constitutional government" rather than "on the language in the statute" of Kansas.

We note, in connection with the *Wichita Case, supra,* that in this court the appellee in that case, the commission, relied most strongly upon the *Kansas City Bolt and Nut Co. Case,* (275 Mo. 529, 252 U. S. 571) and upon the case of *Union Dry Goods Co. v. Ga. P. S. C.,* (248 U. S. 372) upon the authority of which the Bolt & Nut Co. case was affirmed by this court. The appellee here relies strongly upon the same cases. It seems clear from the court's opinion in said Wichita case that this court did not consider said cases to be there in point. And we submit that they are not pertinent, in the least degree, to the case at bar. The legal questions here raised were not involved in those cases.

6.

Appellee complains because appellant calls attention to the fact that appellant did not own one of the buildings to which appellee furnished steam heat, under the contract. Counsel for appellee says: "We submit that in pressing such an argument, appellant asks this court to rule on a pure question of fact, not related to any federal question, and that this court should not do so" (Br. 37). Counsel are quite incorrect in saying that "appellant asks this court to rule on a pure question of fact." The fact appears, unquestioned, in the record. We call the court's attention to said fact, of which appellee had knowledge, as it appears upon the face of the contract in question (Rec. 48), as clearly indicating that the steam heating service rendered by appellee to appellant was rendered pursuant to the contract in question. Except by virtue of the contract, appellee cannot justify this suit against appellant for service to a building which appellant did not own. In other words, it clearly appears that the contract was performed on both sides, and that appellant's rights thereunder became vested. The judgment of the Missouri Supreme Court violates such vested rights and deprives appellant thereof without compensation, that is, without due process of law.

7.

Counsel for appellee, in their brief, have much to say about appellee's numerous contracts made since the Public Service Commission Law was enacted. They say that appellee now has 125,000 of such (Br. 33). We will excuse appellee's going outside the record to make that

statement, as it demonstrates that appellee's private weal, as well as the public weal, has not suffered by reason of appellee's performance of the contract in controversy. Contracts made since the enactment of the commission statute are controlled by the act, and the regulations of the commission issued pursuant thereto. When a utility files a schedule of rates, it files a form of contract for its customers. Such form of contract is part and parcel of the filed schedule. If the utility desires to make a *special* contract with a customer the document must be filed with and have the approval of the commission before it becomes a contract. In this connection, we hazard the statement that if a utility desired to terminate or abrogate such a special contract, which the commission had approved, it could not do so by the mere filing of a new and different schedule of rates for that customer. It is obvious that such a contract could not be abrogated except upon a hearing, on notice, and upon an order by the commission. Just so, a special contract made before the commission statute was enacted, being a perfectly good and valid contract, could not be lawfully or effectually abrogated without a proper hearing, finding and order of the commission with respect thereto. Common sense and the simplest and most elementary principles of law point unerringly to that conclusion. The intervention of the public weal conditions the exercise of the power to abrogate a contract, and there must, necessarily, be some authoritative finding of the fact of the intervention of the public interest in any particular case. Assuredly a public utility company cannot be the complainant and also the judge and jury in such matter.

8.

Point 4 of appellee's brief (37-40) is an attempted answer to Point C of appellant's argument (Appellant's Brief 28-35). Counsel for appellee say: "Under Point C of its brief, appellant seeks to have this court alter the construction placed upon Missouri statutes by the Supreme Court of Missouri." That is quite incorrect. Appellant does not question the *construction* put by the *court upon Section 5208, R. S. Mo., 1929.* The Missouri court concedes, seemingly, that said Section 5208 is applicable to heating companies. It speaks of the same as being "the statute purporting to preserve existing contracts" (for heating service). We say that, having adopted such construction of the statute, the Missouri court erred in refusing to give the statute the effect which legally and necessarily flows from the construction put upon it. We say that the court gives no valid reason, if any, why the statute does not do what the court says that it "purports" to do, namely, what the legislature intended it to do. We say that if the statute, according to legislative intendment, is one "purporting to preserve existing contracts" (to quote the Missouri Supreme Court's language), of which the contract in controversy was one, then, by legislative command, "Nothing in this act (Public Service Commission Law) shall be construed to prevent (appellee) from continuing to furnish * * * service under" said contract (Section 5208, R. S. Mo., 1929). Accordingly, appellant's said contract was not abrogated by legislative authority, or by virtue of any act which was here done under any

section of the statute. If the contract was not abrogated by the mere filing of a schedule of rates, under Section 5190, R. S. Mo., 1929, then the judgment of the Supreme Court of Missouri deprives appellant of its property right in the contract without its being legislatively abrogated, *i. e.*, without due process of law.

The argument of appellee here that said Section 5208 ought not to have been made applicable to heating companies was made to the Missouri Supreme Court, but was not accepted by it. The argument is one that might well have been made to the legislature, but is not an appropriate argument to a court. If the legislature saw fit to preserve existing contracts of heating companies, or to decline to abrogate them, such was within the rightful and exclusive province of the legislature (*Ark. Nat. Gas Co.* v. *Ark. Rd. Comm.*, 261 U. S. 379). The legislature did not thereby abridge or bargain away the police power of the state. It merely declined, as was its right, to exercise it to the fullest possible extent. The same legislature or any subsequent one could have amended or repealed Section 5208, if it so saw fit. There was no agreement not to do so.

Appellant does not claim that the existence of its contract, here in question, prevented the legislature from undertaking to abrogate it. Appellant says, merely, that the legislature, in its rightful discretion, did not see fit to undertake or to authorize its abrogation. Appellant further says that the Supreme Court of Missouri, Division No. 1, undertook, by its judgment herein,

to abrogate, judicially, said contract and that, in so doing, said court usurped a legislative jurisdiction, which was beyond its power to assume. The judgment of said court herein did not, therefore, afford to appellant due process of law in the taking of its property. In *State* v. *Anderson*, 12 Mo. App. 214 (affirmed by Supreme Court, 77 Mo. 110), the court says:

> "But from its very nature, the police power is a power to be exercised within wide limits of legislative discretion; and if a statute appears to be within the apparent scope of this power, it would be a usurpation of jurisdiction for the judicial courts to inquire into its wisdom and policy, or to undertake to substitute their discretion for that of the legislature."

Respectfully submitted,

WILLIAM C. SCARRITT,
ELLIOTT H. JONES,
Counsel for Appellant.

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Supreme Court of the United States

October Term, 1936.

No. 217.

MIDLAND REALTY COMPANY, *Appellant,*

vs.

KANSAS CITY POWER & LIGHT COMPANY, *Appellee.*

Appeal from the Supreme Court of the State of Missouri.

BRIEF OF APPELLEE.

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Supreme Court of the United States

October Term, 1936.

No. 217.

MIDLAND REALTY COMPANY, *Appellant,*

vs.

KANSAS CITY POWER & LIGHT COMPANY, *Appellee.*

Appeal from the Supreme Court of the State of Missouri.

BRIEF OF APPELLEE.

I.

OPINION OF THE COURT BELOW.

The opinion in the case of Kansas City Power & Light Company vs. Midland Realty Company handed down by the Supreme Court of Missouri, Division No. 1, on January 11, 1936, is not as yet officially reported in the Missouri Reports, but the said opinion is reported in full in 93 Southwestern, 2d Series, page 955.

II.

STATEMENT.

The statement of the plaintiff below (appellee here), which was conceded to be correct by the defendant (appellant here), was adopted with only slight change by the Supreme Court of Missouri. The appellant does not follow that statement in his brief here, erroneously states certain facts and raises issues therein not raised in the court below. In fairness to this Court and the appellee, the appellee submits as its statement the statement of the case by the Supreme Court of Missouri in its opinion, 93 S. W. (2d), l. c. 955, 956:

"On February 27, 1908, the defendant entered into a contract with the plaintiff, whereby plaintiff agreed to furnish steam heating service to defendant for several of defendant's buildings located in Kansas City, according to a certain schedule of rates set forth therein. This contract was for a period of five years beginning September 1, 1908, and ending August 31, 1913, with an option to defendant to extend the same for an additional five-year period by giving written notice. The option was exercised May 29, 1913. Before the contract had thus been extended the Public Service Commission Law of the state was enacted on March 17, 1913, and became immediately effective. Laws 1913, pp. 556-651, inclusive, R. S. 1929, C. 33, Mo. St. Ann. § 5121 *et seq.*, p. 6531, *et seq.*

"On June 28, 1917, the plaintiff filed a schedule of rates, effective August 1, 1917, for all of its steam heat customers. Under this schedule the rates provided were higher than those provided in defendant's said contract.

"Early in September, 1917, Kansas City and numerous users of plaintiff's steam heat service (not including this defendant) filed with the Commission complaint against said schedule. After hearings had thereon, the Commission, on February 11, 1918, found said rates to be 'unjust and unreasonable and said rates and prices unreasonably high.' Case No. 1353, 5 P. S. C. Mo. 664. Thereupon, the Commission, by order, fixed and established as just and reasonable a lower schedule of rates and made same effective March 1, 1918. Plaintiff filed a new schedule accordingly. This rate also was higher than defendant's contract rate. It is to be noted that in its case No. 1353 the Commission made no attempt to separate or to allocate values and operating expenses as between heating and electrical services, and was unwilling to do so 'without further investigation.'

"On June 11, 1918, plaintiff entered complaint before the Commission charging that its rates for electric service and for steam heat were inadequate and confiscatory. This complaint was docketed and heard as case No. 1615. 8 P. S. C. Mo. 223. In this latter proceeding the Commission made the allocation which had been omitted in the other case, predicating the same upon its finding that the rates put into effect March 1, 1918, were 'inadequate, unjust and unreasonably low, and that during none of the time was heating revenue sufficient, even to meet the fuel expenses alone.' And the Commission established new rates which displaced the next previous schedule of March 1, 1918. This new schedule did not become effective until December, 1919, as to steam heat, and was even higher than either of the next two preceding schedules. The Commission further found that 'heretofore the steam heat business has been carried at a loss, and this loss has been borne either by the light and power con-

sumers or by the company. This is a distinctly inequitable condition which must be eliminated as soon as practicable.' The findings and order of the Commission established in said case No. 1615 were approved by this Court in *State ex rel. Mary B. Case et al.* v. *Public Service Comm. et al.*, 298 Mo. 303, 249 S. W. 955.

"After August 1, 1917, plaintiff billed defendant for its steam heating service under the schedule effective on that date until March, 1918, and thereafter under the schedule of the latter date until August 31, 1918, which was the date defendant claimed its contract expired; but defendant refused to pay as billed and made payments still in accordance with the rate in its contract, claiming said rates still to be effective, and such payments were credited on account by the plaintiff; the latter claiming the filed schedule rate was the legal and only rate that could be lawfully charged, and that the defendant's rate contract was void.

"This case is for the recovery by the plaintiff from the defendant of the difference between the rates claimed to have been effective and the contract rates for the period August 31, 1917, to March 1, 1918 (pleaded in the first five counts of the petition), and the difference between the rates effective March 1, 1918, and the contract rates for the period from that date to and including August 31, 1918 (pleaded in the last six counts). The court *nisi*, on a trial without a jury, found against the plaintiff on the first five counts of the petition, and found for the plaintiff on the remaining six counts. Both parties appealed.

"The foregoing statement with only slight change is the same as the statement contained in plaintiff's brief and conceded by defendant to be correct. The matters, orders, and records referred to in the statement were

all introduced in evidence on the trial. Apart from that there was no further evidence save the case of *Marty et al.* v. *Kansas City Light & Power Co.*, 303 Mo. 233, 259 S. W. 793, which was introduced. There is no dispute between the parties relative to the amount of the overplus of the schedule rates above defendant's contract rate. This case is before this Court because of the constitutional questions of alleged impairment of obligations of contract and denial of due process raised as issues of law herein upon the undisputed facts." (R. 4-15.)

III.

SUMMARY OF THE ARGUMENT.

1. There is no substantial Federal question before this Court because:

(a) The Supreme Court of Missouri has consistently held that the enactment of the Public Service Commission Law of Missouri and the establishment of rates for public service thereunder by the Public Service Commission is the exercise of the police power of the State which cannot be abridged by private contract in view of Section 5, Article 12, of the Constitution of Missouri, providing "The exercise of the police power of the State shall never be abridged," and that contract rates held for naught and unenforceable by such exercise of the police power is not the impairment of the obligation of contracts protected by the Federal Constitution, nor property rights entitled to the protection of the due process clause of the Federal Constitution. These holdings have been repeatedly approved by this Court.

(Cases supporting the foregoing proposition are cited and discussed in the Argument, *infra,* at pages 10-18.)

(b) The Supreme Court of Missouri has consistently held that a schedule of rates and charges for utility service filed with the Public Service Commission and published in accordance with paragraph 12, Section 5190, Revised Statutes of Missouri 1929 (originally enacted as Sec. 69, Public Service Commission Act, L. of M. 1913, p. 557, l. c. 603), and made applicable to heating utilities by Section 5228, Revised Statutes of Missouri 1929

(originally enacted as Sec. 105a, Public Service Commission Act, L. of M. 1913, page 557, l. c. 637), acquire the force and effect of law, become the only rates and charges that can be lawfully charged for such service until a new or supplementary schedule is filed voluntarily by the utility or by order of the Commission, and are binding on the utility, the public and the Commission, and this Court has consistently put a similar construction upon analogous provisions of the Interstate Commerce Act.

(Cases supporting the foregoing proposition are cited and discussed in the Argument, *infra,* at pages 18-23.)

(c) The construction by the highest court of a State upon its Constitution and laws are controlling upon this Court.

(Cases supporting the foregoing proposition are cited and discussed in the Argument, *infra,* at pages 23, 24.)

2. The enactment of the Public Service Commission Law and the filing of the schedule of rates thereunder effective August 1, 1917, superseded all private contract rates for steam heat then in effect. The filed rate effective August 1, 1917, having been on file with the Public Service Commission for more than thirty days prior to its effective date and not suspended by the Commission, became the lawful rate for steam heating service and was the only lawful rate that could be charged the consumers while it was in effect. Said rates effective August 1, 1917, were just and reasonable charges for steam heating service; they were presumed just and reasonable from their filing until their unreasonable

character should be made to appear; and the doubt cast upon their justness and reasonableness by the findings of the Public Service Commission in case No. 1353 was overcome and destroyed by the subsequent findings and ruling of the Commission in case No. 1615.

(Cases supporting the foregoing proposition are cited and discussed in the Argument, *infra*, at pages 24-32.)

3. When the Public Service Commission of Missouri, after a hearing, promulgated a new schedule of rates effective March 1, 1918, and ordered the appellee to charge said rates for its steam heating service in the future, it effectively substituted the new rates for the ones contained in appellant's contract, even though appellant was not a party to the proceeding. In fixing rates, a public utility commission cannot be clogged or obstructed in its operation by contract rates, and a utility in Missouri may not charge one customer one rate and another a different one.

(Cases supporting the foregoing proposition are cited and discussed in the Argument, *infra*, at pages 32-37.)

4. The Supreme Court of Missouri has correctly construed Section 5208 as not exempting existing contracts from the scope of the exercise of the police power of the State to protect and promote the public welfare by regulating rates of public utilities so as to raise or lower, as the case may be, previously existing contract rates. Since the meaning attributed by the highest court of a State to a statute of the State must be accepted by the United States Supreme Court, on review, as though it had been specially expressed in the statute, this Court will not

determine whether the State Court's construction was right or wrong.

(Cases supporting the foregoing proposition are cited and discussed in the Argument, *infra*, at pages 37-41.)

IV.

ARGUMENT.

1.

The three propositions presented in our Summary of Argument under this point (pages 6, 7, *supra*) will now be discussed in order:

(a) The Supreme Court of Missouri has consistently held that under the Missouri Constitution, Sec. 5, Art. 12, providing "The exercise of the police power of the State shall never be abridged * * *," private contracts for utility rates are for naught and unenforceable when the State exercises the police power so reserved in it by the enactment of the Public Service Commission Act (Laws Missouri 1913, pp. 556-651, inc.; R. S. Mo. 1929, Chap. 33) effective March 17, 1913, and the Public Service Commission establishes rates thereunder. This is on the theory that all private contracts are made subject to the reserved power of the State and when the State exercises this reserved power such contracts being made subject to said reserved power are for naught and unenforceable. In other words, these contracts being made subject to this reserved power are not private contract rights that are entitled to the protection of the Federal constitutional provision prohibiting the abrogation of contracts, and are not property rights, because they are not contract rights that would be subject to due process guaranteed by the due process clause of the Federal Constitution.

Sec. 5, Article 12, of the Constitution of Missouri was adopted as part of the Constitution of Missouri when that instrument was adopted in 1875 (R. S. Mo. 1929,

p. 59). Appellant's contract was entered into February 28, 1908 (R. 47); the Public Service Commission Act of Missouri containing an emergency clause was approved March 17, 1913, and effective April 15, 1913 (Laws of Missouri 1913, p. 651); appellant elected to renew its contract May 29, 1913 (R. 4); the first rate in controversy herein having been filed and published for more than 30 days was effective August 1, 1917 (R. 44); and the second rate in controversy herein was effective March 1, 1918, by order of the Public Service Commission (R. 44). Hence, appellant's contract having been made long after the Missouri constitutional provision was adopted was subject to it, and when the police power of the State was exercised by the enactment of the Public Service Commission Act and rates established thereunder the contract rates of appellant were for naught and unenforceable. The situation might be entirely different if appellant had an existing contract and subsequent to the date thereof a State constitutional provision or statute improperly abrogating said contract was adopted, but such clearly is not the case here. In this case appellant had no contract rights to be abrogated, and having no contract rights, it had no property rights to be protected.

One of the first cases where the above doctrine was announced by the Supreme Court of Missouri was that of *State ex rel. City of Sedalia* v. *Public Service Commission,* 275 Mo. 201, where water rates established by an ordinance of the City of Sedalia were increased by the establishment of rates by the Public Service Commission. In that case the same questions of impairment of obligations of contract and due process was raised as in this case. In that case the Supreme Court, Division No. I, concluded (275 Mo. 201, 212):

"We have preferred to rest the ruling in this case upon what this court has previously ruled, *which rulings have been in the light of our own peculiar constitutional provision.* Under it the sovereign police power of the State is preserved intact, irrespective of contracts with reference to rates for public service. Under it no contract as to rates will stand as against the order of the Public Service Commission for reasonable rates, whether such reasonable rates be lower or higher than the contract rate. Under the Constitution and the Public Service Commission Act the Public Service Commission (supervised by the courts as to the reasonableness of rates) is exercising the police power of the State by its delegated authority from the Legislature. Its rates therefore constitutionally and legally supersede any and all contract rates. Other theories of case law need not be noted." (Italics ours.)

This Court approved the ruling of the Supreme Court of Missouri in that case by dismissing the writ of error of the City of Sedalia for want of jurisdiction upon the authority of *Pawhuska* v. *Pawhuska Oil & Gas Company,* 250 U. S. 394, and *Chicago* v. *Dempcy,* 250 U. S. 651.

State ex rel. City of Sedalia v. *Public Service Commission,* 251 U. S. 547.

In *City of Fulton* v. *Public Service Commission,* 275 Mo. 67, higher telephone rates fixed by the Public Service Commission were protested by the City of Fulton on behalf of its citizen subscribers because of rates fixed by a franchise ordinance. The Supreme Court of Missouri, *In Banc,* followed expressly the ruling in the City of Sedalia case, *supra,* and pertinently said (275 Mo. 67, 71); "All such contracts necessarily are made in contem-

plation of the State's power to fix rates. This disposes of the idea that the revision of rates impairs the obligation of contracts." In that case the court distinguished a contrary ruling in *Sloan* v. *Railroad,* 61 Mo. 24, because "The Sloan case was based upon legislation enacted prior to the adoption of the Constitution of 1875" (275 Mo. 67, 71). As we have stated heretofore, if appellant's contract had antedated the adoption of the Constitution of 1875 containing Sec. 5 of Art. 12, appellant might have a case. But such is not so in this case.

This Court approved the City of Fulton case by dismissing the city's writ of error for want of jurisdiction upon the authority of the same cases cited in dismissing the City of Sedalia case.

State ex rel. City of Fulton v. *Public Service Commission,* 251 U. S. 546.

In *Kansas City Bolt & Nut Company* v. *Kansas City Light & Power Company,* 275 Mo. 529, injunction was sought to prevent higher rates of electricity fixed by the Public Service Commission from being collected because of a private contract rate made prior to the Public Service Commission Act. The plaintiff, Bolt & Nut Company, stood by its contract as appellant in this case, and plaintiff lost in the trial court and in the Supreme Court of Missouri, *In Banc.* The Supreme Court of Missouri therein held, in following the City of Sedalia and City of Fulton cases, *supra,* that there was no valid reason why a rate contract entered into between a private manufacturing corporation and a public service corporation would not be just as much of an abridgment of the rate-making power of the State as would a rate contract between a municipality and such public service corporation, if permitted to stand.

This Court approved the ruling of the Supreme Court of Missouri in the Bolt & Nut Company case by affirming the same upon the authority of *Union Dry Goods Company* v. *Georgia Public Service Corporation,* 248 U. S. 372.

Kansas City Bolt & Nut Company v. *Kansas City Light & Power Company,* 252 U. S. 571.

In *State ex rel. Washington University* v. *Public Service Commission,* 308 Mo. 328, eighteen steam heating consumers of the Union Electric Light & Power Company who had leased their own private heating plants to that utility and as a part of the lease contracts set up contract rates for steam heating service between themselves and that utility, protested the fixing of higher steam heating rates by the Public Service Commission. Other consumers likewise situated did not protest the increased rates. That was a case involving private steam heating rate contracts as this, with the same questions involved. The Supreme Court of Missouri, *In Banc,* held such contracts were not private contract rights, and when so viewed, there were no substance to those sundry contracts. We beg the forbearance of this Court in making a rather long quotation from that case, as the Supreme Court of Missouri sets out the matter so much more clearly than we could possibly do, and also, by making this quotation, a separate treatment of the case of *Chicago & Alton Railroad Company* v. *Tranbarger,* 238 U. S. 67, wherein this Court specifically construes Sec. 5 of Art. 12 of the Missouri Constitution, will not be necessary. The Supreme Court of Missouri said in that case (308 Mo. 328, 342, 345, 346):

> *"These contracts are of no vitality, in so far as they affect rates. The Public Service Commission,*

in fixing rates, cannot be clogged or obstructed by contract rates. This question was early threshed out by this court in several cases, some of which went to the Federal Supreme Court, in each of which this court was sustained. The original case, the ruling in which has never been changed, is *State ex rel. City of Sedalia* v. *Public Service Commission,* 275 Mo. 201. *The effect of this and subsequent holdings, is that contract prices count for naught in the fixing of rates by the Public Service Commission.*" (Italics ours.)

* * * * * * * * *

"IV. Learned counsel for respondent have in view the force and effect of a contract under the views expressed in the Old Dartmouth College case. They overlooked the changes in the law made by constitutional provisions since that date. We have always been a strict constructionist, but in *State ex rel. City of Sedalia* v. *Public Service Commission,* 275 Mo. 210, we had occasion to review the law as it is now. Under our Constitution the police power of the State is held inviolable. [Sec. 5, Art. XII, Mo. Const.] In *State ex rel.* v. *Public Service Commission,* 275 Mo., l. c. 209, we said:

"'Note the language, "the exercise of the police powers of the State shall never be abridged." Under such a constitutional restriction the Legislature would be powerless to enact a valid law by the terms of which the right of the State in the exercise of its sovereign police power in the fixing of reasonable rates for public services could be limited or abridged. This court so held in *Tranbarger* v. *Railroad,* 250 Mo., l. c. 55, whereat BOND, J., said:

"'"(2) All powers of government which regulate the public health, welfare and the property rights of its people—these, no State can strip herself of, for that would render it incapable of carrying out the prime purpose of its creation. The sanctity and import of this attribute of sovereignty are recognized in the Constitution of this State, to-wit: 'The exer-

cise of the police power of the State shall never be abridged, or so construed as to permit corporations to conduct their business in such manner as to infringe the equal rights of individuals, or the general well-being of the State.' [Art. 12, Sec. 5, Constitution of Missouri.] The only restrictions upon the exercise of this faculty are that its use shall be reasonably adapted to the ends for which it is given, and that it shall not infringe any right or privilege guaranteed by the Federal Constitution. The authorities and cases demonstrating these principles are uniform.'

" 'Some of us thought the pronouncement a little broad and dissented, but the case was taken to the United States Supreme Court and there affirmed. [*Chicago & Alton Railroad Co.* v. *Tranbarger,* 238 U. S. 67.]

" 'The United States Supreme Court was even more explicit in this Tranbarger case than was the majority opinion in this Court. To its rule we must bow. At page 76 of this Tranbarger case, 238 U. S. 67, it is said:

" ' "It is established by repeated decisions of this court that neither of these provisions of the Federal Constitution has the effect of overriding the powers of the State to establish all regulations reasonably necessary to secure the health, safety, or general welfare of this community; that this power can neither be abdicated or bargained away, and is inalienable even by express grant; and *that all contract and property rights are held subject to its fair exercise.* [*Atlantic Coast Line* v. *Goldsboro,* 232 U. S. 548, 558, and cases cited.] And it is also settled that the police power embraces regulations designed to promote the public convenience or the general welfare and prosperity as well as those in the interest of the public health, morals or safety. [*Lake Shore & Mich. Southern Ry. Co.* v. *Ohio,* 173 U. S. 285, 292; *C. B. & Q. Ry. Co.* v. *Drainage Commissioners,* 200

U. S. 561, 592; *Bacon* v. *Walker,* 204 U. S. 311, 317.]'' ' (Italics ours.)

"The fixing of a rate for a public commodity, as we have here, falls under the police power of the State. From the beginning we have so ruled. This constitutional provision disrobes the contention of interveners as to private contract rights. *They are not private contract rights,* and when so viewed, there is no substance to these sundry contracts.'' (Italics ours.)

Note the words of the Supreme Court of Missouri, "These contracts are of no vitality, in so far as they affect rates,'' "The Public Service Commission, in fixing rates, cannot be clogged or obstructed by contract rates,'' "Contract prices count for naught in the fixing of rates by the Public Service Commission,'' and "They are not private contract rights, and when so viewed, there is no substance to these sundry contracts,'' and the words of this Court in the Tranbarger case, "All contract and property rights are held subject to its fair exercise,'' speaking of Sec. 5, Art. 12, Missouri Constitution.

This Court dismissed the writ of error of Washington University on the authority of Sec. 237 of the Judicial Code, as amended, and, treating the writ of error as an application for certiorari, denied it for want of a substantial Federal question, on the authority of *Skulthis* v. *McDougal,* 225 U. S. 561, 569; *Hull* v. *Burr,* 234 U. S. 712, 720; *Norton* v. *Whiteside,* 239 U. S. 144, 147.

State ex rel. Washington University v. *Public Service Commission,* 275 U. S. 489.

In view of all of the foregoing, we believe that under the construction given by the Supreme Court of Missouri

and this Court of the peculiar provisions of Sec. 5, Art. 12, of the Missouri Constitution, appellant's contract made subsequent to the adoption of said constitutional provision was subject thereto the same as if it had been written into that contract that "these rates shall be null and void and of no further force and effect when the State of Missouri exercises its police power by the establishment of rates for such service by legislative enactment or delegation thereof to some public body under the power reserved to the State of Missouri by Sec. 5 of Article 12 of the Missouri Constitution." And said rates becoming inoperative and unenforceable by virtue of the exercise of the State's prior, reserved right of the police power they ceased to be private contract rights. Therefore, when they are not private contract rights they cannot be impaired, and, not being contract rights, they certainly cease to be property rights subject to the protection of due process.

(b) The construction of par. 12, Sec. 5190, R. S. Mo. 1929, by the Supreme Court of Missouri upon the method of putting into effect a schedule of rates by the Public Service Commission is questioned in this case. The pertinent part of said paragraph and section is as follows:

> "Unless the commission otherwise orders, no change shall be made in any rate or charge, or in any form of contract or agreement, or any rule or regulation relating to any rate, charge or service, or in any general privilege or facility, which shall have been filed and published by a gas corporation, electrical corporation, water corporation or municipality in compliance with an order or decision of the commission, except after thirty days' notice to the commission and publication for thirty days as required by order of the commission, which shall plainly

> state the changes proposed to be made in the schedule then in force and the time when the change will go into effect. The commission for good cause shown may allow changes without requiring the thirty days' notice under such conditions as it may prescribe. No corporation or municipality shall charge, demand, collect or receive a greater or less or different compensation for any service rendered or to be rendered than the rates and charges applicable to such services as specified in its schedule filed and in effect at the time."

This section, which applies to gas, electric and water utilities, together with cognate Sec. 5151, R. S. Mo. 1929, pertaining to railroads, street railroads and common carriers, and Sec. 5209, R. S. Mo. 1929, pertaining to telegraph and telephone utilities, are made applicable to heating utilities by Sec. 5228, R. S. Mo. 1929, originally enacted as Sec. 105a, Public Service Commission Act, L. of M. 1913, p. 557, l. c. 637.

Under said par. 12, Sec. 5190, as well as under the other cognate sections, a rate for public service may be established either by order of the Commission upon a hearing, or by the voluntary filing and publishing of the same with the Commission for a period of thirty days before its effective date, which rate so filed and published, if not suspended by the Commission within the thirty-day period, becomes the established rate.

In *State ex rel. St. Louis Gas Company* v. *Public Service Commission,* 315 Mo. 312, the Supreme Court of Missouri, Division I, in construing par. 12, Sec. 5190, said (315 Mo. 312, 317):

> "*A schedule of rates and charges filed and published* in accordance with the foregoing provisions *acquires the force and effect of law;* and as such it is

binding upon both the corporation filing it and the public which it serves. It may be modified or changed only by a new or supplementary schedule, filed voluntarily, or by order of the Commission. Such is the construction which has been universally put upon analogous provisions of the Interstate Commerce Act (*Louisville Ry. Co.* v. *Maxwell,* 237 U. S. 94; *Gulf Ry. Co.* v. *Hefley,* 158 U. S. 98); and we have so ruled with respect to similar provisions of our Public Service Commission Law relating to telegraph companies. (*State ex rel.* v. *Public Service Commission,* 264 S. W., l. c. 671-2). *If such a schedule is to be accorded the force and effect of law, it is binding not only upon the utility and the public, but upon the Public Service Commission as well.*" (Italics ours.)

In *Marty* v. *Kansas City Light & Power Company,* 303 Mo. 233, the Supreme Court of Missouri, Division No. I, in holding valid and lawful the filing of the very rates in question in this case effective August 1, 1917, said as follows (303 Mo. 233, 241, 242):

"Under the provisions of Section 10516, Revised Statutes of 1919, all the provisions of the Public Service Law, relating to utilities so far as the same shall be practically, legally or necessarily applicable to heating companies, are made applicable to heating companies. The schedule of rates filed by defendant on June 23, 1917, was filed under the provisions of Section 10497, and other cognate sections dealing with the subject of filing schedules of rates by utility companies. *The filing of the schedule was notice to the Commission. It is not contended here by respondent that the schedule filed June 23, 1917, and going into effect on August 1, 1917, was not filed in conformity with the provisions of the act.* The fact that no notice of it was given directly by appellant to the consumers is referred to here, rather by way

of explanation of the reason why the consumers did not sooner protest, than otherwise; but, the evidence tends strongly to show that the Commission did promptly mail a notice of the filing of this schedule to the city counselor of Kansas City. *That schedule became effective on August 1, 1917—became the lawful rate—until set aside by an order of the Commission, and could then be set aside only after a hearing.* * * *." (Italics ours.)

Likewise, in *State ex rel. Western Union Telegraph Company* v. *Public Service Commission,* 304 Mo. 505, the Supreme Court of Missouri, *in banc,* held that telephone rates filed and published with the Commission for thirty days, without having been suspended by the Commission, became, and until changed by the filing of a new schedule or by order of the Commission, the lawful rates and charges, binding upon both the corporation filing them and the persons who avail themselves of its service. In that case, the filing was under Sec. 5209, R. S. Mo. 1929, pertaining to telegraph and telephone utilities cognate to par. 12, Sec. 5190, and made applicable by Sec. 5228, R. S. Mo. 1929, to heating utilities.

Such is the construction of said statute by the highest court of Missouri. It is common knowledge and an accepted fact of which this Court will take judicial notice that all Public Service Commissions as well as the Interstate Commerce Commission have technical staffs of rate experts who carefully examine all filed rates by utilities as to their reasonableness before they are allowed to go into effect at the effective date, and that if there is any question as to their reasonableness a suspension order is issued and the rate suspended pending a hearing. Such Commissions pass upon rates not only by a hearing, but by examination of filed rates pending their effective date.

The reports of this Court are replete with cases where filed rates have been suspended before their effective date after examination by a Commission. Also the cases above cited show, and the Public Service Commission Law herein cited shows, that severe penalties are inflicted upon a utility for charging other than the authorized rate whether it be a filed rate or one fixed by order of the Commission, and for discrimination between consumers. In *State ex rel. Kansas City Public Service Company* v. *Latshaw,* 325 Mo. 908 (appeal dismissed for want of jurisdiction. Treating the papers whereon the appeal was allowed as a petition for writ of certiorari, certiorari denied, 282 U. S. 806), a franchise contract made many years after the effective date of the Public Service Commission Act of Missouri fixing rates was held for naught and unenforceable on the same constitutional grounds as in the cases heretofore cited in 1 (a). Therefore, contracts made after as well as before the effective date of the Public Service Commission Law are in the same category. The appellee, as can be seen from the cases herein cited, had many contracts at the time the Public Service Commission Act became effective, and it has some 125,000 contracts with consumers at the present time. It is common knowledge of which this Court will take judicial notice, that all utilities at all times had or have contracts for service with all of their consumers at the rates existing at the time the contracts are made. Therefore, if appellant's theory is correct and the Public Service Commission had to make every consumer with a contract a party to a suit and determine the reasonableness of every individual contract as to rates, whether the contracts were made before or after the effective date of the Public Service Commission Act, *the Commission would be hopelessly clogged with litigation and rates*

could never be expeditiously fixed and determined, whether lowered or raised, for the public good. The Commission simply could not function. It may be true that in a few states their laws provide and their highest courts have construed said laws that before a contract rate could be set aside the consumer party and the particular rates in the particular contract had to come before a commission for determination, but the consistent holding of the Supreme Court of Missouri pertaining to Missouri's peculiar constitutional provision and statute is to the contrary, and as heretofore set out. Clearly the filed and published rates effective August 1, 1917, were the lawful rates and the only rates that appellee could charge its steam heating consumers, including appellant, for the period they were in effect, and likewise the rates effective March 1, 1918, fixed by order of the Public Service Commission.

This Court has consistently held in construing provisions in the Interstate Commerce Act analogous to those in par. 12, Sec. 5190, R. S. Mo. 1929, that a duly filed and effective rate for railroad service is the lawful rate and the only rate that the railroad can charge until supplanted by a newly filed rate or one put into effect by the Interstate Commerce Commission by order duly made.

Louisville & Nashville Railroad Company v. *Maxwell*, 237 U. S. 94;
The Gulf, Colorado & Santa Fe Railway Company v. *Hefley*, 138 U. S. 98.

(c) This Court has consistently ruled that it is bound by the construction put upon the peculiar constitutional provisions of a state and the peculiar statutes of a state by the highest court of a state.

Georgia Railway & Power Company v. *Town of Decatur*, 262 U. S. 432, and cases therein cited (262 U. S. 432, 438).

We submit, that in this case where the Supreme Court of Missouri has construed Sec. 5 of Art. XII of the Missouri Constitution as it has (which construction has been approved by this Court) and par. 12 of Sec. 5190, R. S. Mo. 1929, and cognate statutes as it has, this Court should be bound by such construction, and that in view of all of the foregoing there is no substantial Federal question before this Court and the appeal should be dismissed.

2.

It should be noted at the outset of this point that this is a suit at law to recover (in counts 1 to 5) the difference between the rates charged by a utility under a schedule of rates filed by the utility with the Public Service Commission in strict compliance with a specific enactment of the Missouri Legislature, and the rates specified in a contract executed before the enactment of the Public Service Commission law, and to recover (in counts 6 to 11) the difference between the rates charged by a utility under a schedule of rates fixed by the Public Service Commission and the rates specified in said contract.

In both instances, it is pleaded by appellee (R. 26) and not disputed by appellant, that as soon as the two rates above mentioned became effective, appellee disregarded the contract rates and billed appellant according to the "filed" rate during the time it was in effect and the rate established by the Commission from and after its effective date.

We emphasize this point to illustrate the incorrectness of appellant's statement in its brief (p. 5) "* * * appel-

lee continued to render heating service to appellant and appellant continued to pay for same, in accordance with the contract, throughout the full term of the contract. That is to say, the contract was fully performed on both sides."

Appellant contends appellee should not recover on counts 1 to 5 of its petition for two reasons, namely:

(1) The Public Service Commission, in 5 Mo. P. S. C. Rep. 664-683, found that the schedule of rates effective August 1, 1917, was unreasonable, excessive and unlawful; and

(2) A rate which is merely "filed" even though in strict conformance with a legislative enactment, cannot serve to supersede a pre-existing contract fixing a lower rate.

(1)

In answer to the first contention, we respectfully call to the Court's attention that the Missouri Public Service Commission (8 Mo. P. S. C. Rep. 223), in what might be termed a continuation of the former hearing, held that the August 1, 1917, rates were inadequate, unjust and unreasonably low.

We feel justified in referring to the subsequent hearing as a continuation of the former because the Supreme Court of Missouri in *Marty et al.* v. *Kansas City Light & Power Co.*, 303 Mo. 233, so regarded it. In that case, the same rate as the one in the case at bar was in controversy. The facts were these: After the Commission had held the August 1, 1917, rate to be unreasonably high and had established the March 1, 1918, rate, plaintiffs therein sued Kansas City Light & Power Co. (appellee's predecessor) for the difference between what they had paid under the August 1, 1917, rate and what they claimed

they should have paid under the March 1, 1918, rate. Appellee's predecessor offered in evidence, as appellee did in the case at bar (R. 46), the findings of the Commission in case No. 1615, wherein it was held both former rates were unreasonably low and confiscatory. Recovery was denied, and it was said in 303 Mo. 233, 243, 244:

> "The finding of the Public Service Commission in case No. 1353 cannot be held to be conclusive as against the finding of the same body covering that period in case No. 1615. * * * The findings in the later case, made upon a manifestly fuller investigation, and specifically set forth, covering and including the period of the former investigation, * * * wholly overcome and destroy the general findings made in the earlier case."

Accordingly, it cannot now be reasonably urged that the August 1, 1917, rate was "conclusively established to be unreasonable, excessive and unlawful." On the contrary it was declared to be unreasonably low and confiscatory by the Supreme Court of Missouri.

> *State ex rel. Mary B. Case et al.* v. *Public Service Commission et al.,* 298 Mo. 303.

(2)

In answer to appellant's second contention we first call to the Court's attention Section 5190, R. S. Mo. 1929, under the authority of which said rate schedule effective August 1, 1917, was filed. It's applicable portions are set out in this brief at pages 18 and 19.

The appellate courts of Missouri have time and again construed paragraph 12 of section 5190 to mean that a rate properly filed with the Commission and duly published in strict conformance with said section, and not

having been suspended by the Commission, to be the only rate chargeable by the utility during the period in which the rate is in effect.

In *State ex rel. St. Louis Gas Company* v. *Public Service Commission*, 315 Mo. 312, plaintiffs sought to require defendant to extend its gas mains to reach their residences. Prior to the filing of the complaint defendant had offered to render and plaintiffs had refused to accept gas service under the terms of defendant's rules governing extensions of its mains which had been duly filed with the Commission, as a part of its rate schedule, and published, under the provisions of said section 5190. The aforesaid rate schedule containing said rules governing extensions had been merely "filed" and published precisely in the same manner as in the case at bar. The Commission ordered the defendant to comply with the demands of plaintiffs (which were in conflict with said rules) and defendant appealed. The Court, in upholding defendant's "filed" and published schedule, said at 315 Mo. 312, 317:

> "A schedule of rates and charges filed and published in accordance with the foregoing provisions acquires the force and effect of law; and as such it is binding upon both the corporation filing it and the public which it serves. It may be modified or changed only by a new or supplementary schedule, filed voluntarily, or by order of the Commission. Such is the construction which has been universally put upon analogous provisions of the Intertstae Commerce Act (*Louisville Ry. Co.* v. *Maxwell*, 237 U. S. 94; *Gulf Ry. Co.* v. *Hefley*, 158 U. S. 98); and we have so ruled with respect to similar provisions of our Public Service Commission Law relating to telegraph companies. [*State ex rel.* v. *Public Service Commission*, 264 S. W., l. c. 671-2.] If such a schedule is to be accorded the force and effect of law, it is binding

not only upon the utility, and the public, but upon the Public Service Commission as well."

In *Marty et al.* v. *Kansas City Light & Power Co.*, 303 Mo. 233, plaintiffs therein sued defendant (appellee's predecessor) to recover the amount of alleged excess charges paid for steam heat furnished between August 1, 1917, and March 1, 1918, the period in which the "filed" and published rate was in effect. The Supreme Court of Missouri denied recovery for the sole reason that the August 1, 1917, rate, having been properly filed and published under the provisions of section 5190, and other cognate sections, was lawful. It became the lawful rate, the court held, until set aside by an order of the Commission, and could then be set aside only after a hearing.

In *State ex rel. City of Kirkwood* v. *Public Service Commission et al.*, 330 Mo. 507, plaintiff sought to have annulled an order of the Missouri Public Service Commission for the reason, among others, that said order would interfere with a contract plaintiff had made with a third person. The court overruled the contention and said (330 Mo. 507, 521):

> "What contracts may have been made is not a real consideration of the Public Service Commission, under its limited authority. If a concrete case comes within its purview, the Commission is authorized to make orders (under the police power) which will best subserve the public welfare. This is irrespective of contract rights."

These decisions of the Supreme Court of Missouri lead to but one conclusion: That the filing and publishing of a schedule of rates in strict conformance with section 5190 has the effect of rendering contract rates unenforceable.

Said section does not violate the contract impairment or the due process of law provisions of the Federal Constitution and this Court has never held that it did.

Appellant places much reliance on *Wichita R. & L. Co.* v. *P. U. Comm.*, 260 U. S. 48, but the same is not in point herein. Counsel for appellant have misunderstood the nature of the court's ruling therein. The decision was based upon a Kansas statute wholly unlike Missouri's and upon constructions of said Kansas statute by Kansas courts, wholly unlike those of the Missouri courts. The Kansas statute requires a schedule of rates to be effective to have been approved by some overt act of the Commission; the Missouri statute does not. The Kansas courts have construed the statute to mean that a contract for rates with a public utility cannot be abrogated except after a finding by the Commission that they are unreasonable.

> *Kaul* v. *American Independent Teleph. Co.*, 95 Kan. 1.

The courts of Missouri have construed section 5190 to mean that when a utility files and publishes a schedule of rates in conformance therewith, all contracts for rates in conflict therewith are *ipso facto* rendered unenforceable.

So the import of the Wichita case is simply this: Where the statutes and decisions of a state preserve existing contract rates until the Public Service Commission of the state has found the contract rates to be unreasonable, the mere filing and publishing of a rate without such a finding does not, of itself, set aside the contract rates. No such problem is involved in the case at bar.

But opposing counsel say the Wichita case was not based upon the peculiar statutes of Kansas, and quote in

their brief (p. 19) three sentences from the opinion to prove it was based on general principles of constitutional government. Here again counsel for appellant have misunderstood the import of the court's language. Immediately preceding the quoted sentences this Court said it was a necessary principle that an administrative agency created by the Legislature must pursue the procedure and rules enjoined by the Legislature and show a substantial compliance therewith to give validity to its action. *That* was the conclusion referred to by this Court in the Wichita case as being in accord with "general principles of constitutional government."

The Missouri courts have construed the Missouri statute as authorizing substituted rates for existing rates without the necessity of the Commission making a finding of facts or any other order as a condition precedent to the validity thereof. Under such a construction the principles announced in the Wichita case have been accorded full respect in the procedure followed by appellee and the "procedure and rules enjoined" have been followed to the letter.

Appellant also cites *Hinkel Dry Goods Co.* v. *Wichison Ind. Gas Co.*, 64 F. (2d) 881 (C. C. A.), as supporting its proposition. Said case is no more in point than the Wichita case, because it also deals with the Kansas statute. The Circuit Court simply held that under the law of Kansas, a rate contract remains in full effect until there has been an order of the Commission finding the rates are unreasonable. But in speaking of said rate contracts the court does say (64 F. [2d] 881, 883):

> "* * * such contracts are presumed to have been made in contemplation of the paramount power of the state to regulate the rates * * *."

In *Attleboro Steam & El. Co.* v. *Narragansett El. Light Co.*, 295 F. 895, also relied upon by appellant, the District Court simply held that a local statute did not permit the substitution of a rate contract without a finding that the contract rate was unreasonable. To the same effect are the cases of *In re Searsport Water Co.*, 118 Me. 362; *Kaul* v. *Am. Tel Co.*, 95 Kan. 1; *So. Utilities Co.* v. *Palatka*, 268 U. S. 232, and *Jefferson Deposit Co.* v. *Central Ill. Light Co.*, 309 Ill. 262. None of them dealt with the Missouri statute.

In advancing such an argument, appellant obviously loses sight of the fact that the Missouri Public Service Commission did, in effect, make a finding that the contract rates involved herein were unreasonable when it held, after a full investigation in case No. 1615 (8 Mo. P. S. Rep. 223-301) that both the August 1, 1917, and the March 1, 1918, rates, both of which were higher than the contract rate, were unreasonably low and confiscatory during the periods they were in effect. And the Supreme Court of Missouri, when said case came up on appeal, ruled likewise.

> *State ex rel. Mary B. Case et al.* v. *Public Service Commission et al.*, 298 Mo. 303.

This Court has held that the Commission need not rule *in so many words* that contract rates are unreasonable and should be terminated. An order fixing new rates and determining that existing rates are unreasonably low and confiscatory is just as effective as if, after fixing the rates, there had been added therein the words "and it is hereby ordered that the contract rates shall be terminated."

> *John C. Denney et al.* v. *Pacific Telephone and Telegraph Company*, 276 U. S. 97.

We respectfully submit, therefore, that the Supreme Court of Missouri correctly stated the law of Missouri when it said in the case at bar (R. 15):

> "So, on the predetermined and undisputed facts before us we hold that the contract in controversy should be deemed nugatory from and after August 1, 1917,"

and that said ruling was in accord with general principles of constitutional government.

3.

What has been said in the preceding point was in answer to appellant's point A, and pertains, likewise, to counts one to five of appellee's petition. Herein we shall answer appellant's contentions in point B, pertaining in the main, to counts six to eleven of appellee's petition.

Risking repetition, we emphasize that appellee seeks to recover in counts six to eleven the difference between what appellant paid for steam heating service from March 1, 1918, until September 1, 1918 (based on the contract rates), and the amount appellant should have paid based upon rates fixed by the Public Service Commission after a complaint and hearing, and effective March 1, 1918. Appellant was not actually a party to the proceeding in which said rates were established by the Commission.

It was held in the state courts that the promulgation of said rates by the Commission substituted new rates into appellant's contract. Appellant contends it was not affected by the order of the Commission in case No. 1353 (1) because it was not a party to the proceeding, and (2) because the Commission made no specific order in which appellee's contract was called by name.

As to the former contention, the court will immediately

recognize that nearly all utilities have written contracts with their customers specifying rates, and that if a Public Service Commission could not raise or lower rates without first causing process to be served on every customer of the utility having a contract (in the case of appellee at the present time, some 125,000 customers have written contracts) the Commission would be so clogged and obstructed in its work that it could not function. A schedule of rates promulgated by a public service commission after a hearing supersedes *all* existing rates for the class of service covered thereby—not merely those schedules included in contracts with customers who were parties to the hearing. If that were not the law, no effect would be given the statutory provision that "* * * No corporation * * * shall charge * * * a greater or less * * * compensation for any service rendered or to be rendered than the rates and charges applicable to such services as specified in its schedule filed and in effect at the time * * *."

Section 5190, R. S. Mo. 1929, Vol. I, p. 1448.

The Public Service Commission Act provides that any interested party may intervene in any proceeding before the Commission.

Section 5232, R. S. Mo. 1929, Vol. I, p. 1472.

Many customers did intervene in cases 1353 and 1615. As the Supreme Court of Missouri said (R. 13):

> "From the number of cases that have come to this Court and the number of parties involved in them, it may fairly be inferred that the rate schedules in question were of more than passing local interest and notoriety, and that defendants (appellant) were aware of them from the beginning * * *."

Since appellant did not avail itself of the opportunity of being heard by the Commission in either of the proceedings, it should not now be rewarded therefor.

We respectfully urge that appellant's second proposition is also without merit. The contention is that appellant's rate was not affected because the Commission, when it established a new schedule of rates effective March 1, 1918, and declared it to be reasonable, did not specifically declare appellant's contract, providing for a lower rate, to be unreasonable.

Such a contention does violence to the fundamental theory of rate-making in Missouri, which is that there shall be no special favors, rebates, preferences, privileges or remittances to one customer in exclusion of the others.

Section 5189, R. S. Mo. 1929;
Section 5190, R. S. Mo. 1929.

This matter has been adjudicated in Missouri contrary to appellant's contention many times, and most of the cases have been approved by this Court. We will not summarize the decisions here for they have been summarized and quoted from under point 1 (pages 10-24) of this brief. In all of the Missouri cases in which the question was raised the Supreme Court of Missouri held that when the Public Service Commission makes an order establishing rates to be charged by a utility, different rates specified in an existing contract are "of no vitality" and are for naught and unenforceable.

State ex rel. City of Sedalia v. *Public Service Commission,* 275 Mo. 201 (approved by this Court in 251 U. S. 547);
City of Fulton v. *Public Service Commission,* 275 Mo. 67 (writ of error dismissed, 251 U. S. 546);

Kansas City Bolt & Nut Co. v. *Kansas City Light & Power Co.*, 275 Mo. 529 (affirmed in 248 U. S. 372);

State ex rel. Washington University v. *Public Service Commission*, 308 Mo. 328 (writ of error dismissed, 275 U. S. 489).

In addition to these Missouri cases, we again call to the Court's attention the decision in *John C. Denney et al.* v. *Pacific Telephone & Telegraph Co.*, 276 U. S. 97. In that case, appellees operated telephone plants in various cities in the State of Washington under local franchises which designated maximum permissible rates. Appellees filed schedules of proposed increased rates which were suspended. A hearing was had and the matter ultimately reached this Court. One of the contentions made before this Court was that the rates specified in the contract should continue until the Commission made an order specifically declaring *in so many words* that the contract should be terminated. This Court overruled that contention and held (276 U. S. 97, 103) that the order of the Commission was just as effective as if, after fixing the new rates, it had added thereto words specifically terminating the schedule of rates contained in the contract.

Appellant complains that there never was a finding by the Commission that the performance of the contract involved herein would have been detrimental to the public welfare and argues, therefore, that the contract was not affected. The cases cited by appellant as supporting said contention are not applicable, and such is not the law in Missouri.

Kansas City Nut & Bolt Co. v. *Kansas City Light & Power Co.*, 275 Mo. 529.

In *Arkansas Nat. Gas Co.* v. *Ark. Rd. Comm.*, 261 U. S. 379, the court was dealing with the Arkansas statute (Act 443, Acts of Arkansas 1921, p. 429) which provides that the Railroad Commission "Shall have no jurisdiction or powers to modify or impair any existing contracts for supplying gas to persons * * * and such contracts shall not be affected by this act or the act of which this is an amendment." No such limitation is imposed on the Missouri Commission. On the contrary, as hereinbefore stated, the Constitution, the statutes and the decisions of Missouri expressly provide that contract rates, when they conflict with rates fixed by the Commission, are for naught and unenforceable.

But even if appellant's statement of the law be conceded to be correct, it could not vitiate the opinion of the Missouri Supreme Court herein, because the Commission in case No. 1353 expressly found the rates "now being charged by the defendant for steam heating service * * * are unjust and unreasonable, and that said rates and prices are unreasonably high."

> *In re Kansas City* v. *Kansas City Light and Power Co. et al.*, 5 Mo. P. S. C. Rep. 664, 682 (R. 45-46).

The point raised by appellant in its brief (p. 25) that it did not own one of the buildings for which steam was furnished is a new point raised for the first time in this Court. It was neither briefed nor argued in the state courts. The contract (R. 48) says that appellant "* * * now has, owns or controls two buildings, one * * * (which stands in the name of Laura B. Minor) * * *." There is no other evidence on the subject. Appellant has never before stated in these proceedings that it did not own both buildings despite the fact that title may have

stood in the name of another (for convenience, or as a straw party, perhaps). We submit that in pressing such an argument, appellant asks this Court to rule on a pure question of fact, not related to any Federal question, and that this Court should not do so.

Lewis v. *Campau*, 3 Wall. 106.

And appellant in its answer (R. 34) admits it received service from appellee during the entire period here in controversy.

In view of the foregoing, we submit that the Supreme Court of Missouri correctly stated the law governing the rates fixed by the Commission when it said (R. 9):

> "It seems to be well settled by our decisions that the Commission has the power to fix by order reasonable * * * heating charges at rates exceeding the maximum prescribed by * * * individual contracts; that such order does not in the constitutional sense impair the obligations of such contracts. And that such rates automatically supersede all rates coming in conflict therewith."

4.

Under point C of its brief, appellant seeks to have this Court alter the construction placed upon Missouri statutes by the Supreme Court of Missouri.

The particular statutes in question are Section 5208, R. S. Mo. 1929, which provides:

> "Nothing in this act shall be construed to prevent any telegraph corporation or telephone corporation from continuing to furnish * * * service under any contract or contracts in force at the date this article takes effect or upon the taking effect of any schedule or schedules of rates subsequently filed with the

> Commission, as hereinafter provided, at the rates fixed in such contract or contracts * * *,"

and Section 5228, R. S. Mo. 1929, which provides:

> "All provisions of this chapter in reference to railroad corporations, street railroad corporations, common carriers, gas corporations, electrical corporations, water corporations, telephone and telegraph corporations, in reference to * * *. All other sections, paragraphs, provisions and parts of this chapter in reference to any other corporations subject to any of the provisions of this chapter, so far as the same shall be practically, legally, or necessarily applicable to heating companies in this state, are hereby made applicable to such heating companies * * *."

Appellant reads these two sections together and interprets them to mean that "the Legislature * * * inhibited the abrogation of the contract in question" (Appellant's Brief, p. 10).

It is respectfully submitted the Missouri Legislature did no such thing. The Supreme Court of Missouri has heretofore held that the Commission has the power to fix reasonable telephone, light and heating charges at rates exceeding the maximum prescribed by ordinance, franchise or individual contracts and that such rates automatically supersede all rates which come into conflict therewith.

> *State ex rel. Sedalia* v. *Public Service Commission,* 275 Mo. 201;
> *City of Fulton* v. *Public Service Commission,* 275 Mo. 67;
> *Kansas City Bolt and Nut Co.* v. *Kansas City Light & Power Co.,* 275 Mo. 529;
> *State ex rel. Washington University* v. *Public Service Commission,* 308 Mo. 328.

Note that section 5228 provides that only those sections of chapter 33 as are "practically, legally and necessarily" applicable to heating companies are thereby made applicable to such heating companies. We respectfully submit that section 5208, which specifically restricts its application to telegraph and telephone corporations, is not "practically, legally and necessarily" applicable to heating companies. It is to be noted that the Legisature did not make provisions similar to those contained in section 5208 in its regulation of electric companies, water companies, gas companies, railroad companies, street railroad companies, or common carriers. It singled out only telegraph and telephone companies. Just why section 5228 is classified as a part of Article V of the Public Service Commission law in reference to telegraph and telephone corporations, rather than as a part of article IV, in reference to water, gas and electric companies, or why it was not given a separate classification, is not disclosed by a careful study of the statute. There is not as much logical connection between section 5228 and the remainder of article V as there is between section 5228 and article IV. Steam heating is more naturally allied with the generation of electricity for light and power than with the operations of telegraph and telephone companies. Except for the accident of such physical classification with telegraph and telephone corporations, there is no more reason for excepting any part of the contracts of heating companies from the regulatory power of the Commission than there is for applying such exceptions to the contracts of gas, electric and water corporations and holding that they are not subject to the regulatory power of the Commission. In other words, should the rate fixing provisions relating to telegraph and telephone corporations be regarded as "practically, legally

or necessarily'' applicable to heating companies? We think not.

We feel a much more intelligent meaning was placed upon sections 5228 and 5208 by the Supreme Court of Missouri. In effect, the Supreme Court of Missouri held (R. 11) that, even conceding paragraph 4 of section 5208 to be applicable to heating companies, said statute does not exempt such contracts from the exercise of the police power of the state to promote the general welfare by regulating rates of a public utility so as to raise previously existing contract rates. To have held otherwise would have nullified the plain provisions of paragraph 3 of Section 5189, R. S. Mo. 1929, wherein it is provided that no utility may receive a greater or less compensation for its service than it charges or receives from any other person under the same circumstances, and the plain provisions of paragraph 12 of Section 5190, R. S. Mo. 1929, wherein it is provided that no utility shall receive a greater or less compensation for its service than the rates applicable to such service as specified in its schedule filed and in effect at the time.

In other words, a telegraph or telephone company, under section 5208, was allowed the *option* of continuing a rate contract in effect if it did not violate the provisions of said sections 5189 and 5190. Whatever else may be said, it must be conceded that the highest court in Missouri has construed section 5208 in the light of the provisions of the Constitution of Missouri (R. 11) and has interpreted said statute to mean that rates specified in contracts are not thereby preserved when the Public Service Commission approves a new schedule of rates. Such being the case, the question becomes one of pure local law, and this Court has consistently held it will not

review a decision of a state court attributing a particular meaning to a statute of that state.

Supreme Lodge etc. v. *Meyer,* 265 U. S. 30.

CONCLUSION.

It is respectfully submitted in conclusion that since the highest court of Missouri has consistently held that the enactment of the Public Service Commission Law and the establishment of rates thereunder by the Commission is a proper exercise of the police power reserved under the Missouri Constitution, there has been no violation of the due process clause of the Federal Constitution, the contract rates herein involved having been superseded in the statutory manner; and since the highest court of Missouri has held that all contracts made with public utilities have, in effect, written into them "subject to the exercise of the state's police power by the creation of a Public Service Commission and the establishment of higher rates by said Commission" appellant had no such contract as is afforded protection under the Federal Constitution.

Respectfully submitted,

LUDWICK GRAVES,
IRVIN FANE,
Counsel for Appellee.

WM. CHAMBERLAIN, of Chicago,
Of Counsel.

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Supreme Court of the United States

No. 217.

OCTOBER TERM, 1936.

MIDLAND REALTY COMPANY, APPELLANT,

VS.

KANSAS CITY POWER & LIGHT COMPANY, APPELLEE.

APPELLANT'S PETITION FOR A REHEARING.

ELLIOTT H. JONES,
Counsel for Appellant.

SCARRITT, JONES & NORTH,
Of Counsel.

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MIDLAND REALTY COMPANY, APPELLANT,
VS.
KANSAS CITY POWER & LIGHT COMPANY,
APPELLEE.

APPELLANT'S PETITION FOR A REHEARING.

Now comes appellant, Midland Realty Company, and respectfully petitions the court to grant a rehearing of the above-entitled cause for the reasons and upon the grounds as follows, to-wit:

(1) The court fell into error upon a crucial matter when, in its opinion, it said that "Under the challenged statute, defendant had opportunity to support the contract rates * * *" before the contract was, assertedly, abrogated. The fact is that appellant had no knowledge and no notice, actual or constructive, of the filing of the schedule of rates here in question, before August 1,

1917, the named effective date thereof, that is, before the contract was thereby effectually abrogated, according to the decision of the Missouri Supreme Court. Having no notice appellant had no opportunity to be heard concerning said schedule, as affecting its contract, prior to its asserted abrogation.

(2) The court overlooks in its opinion herein, an important proposition which was presented by appellant, to-wit, that the power of the state to abrogate a contract, such as we have here, is not an absolute one, and does not exist *per se*, and that such power arises only upon the condition that it is made to appear, in any particular instance, that public necessity or the public welfare requires the abrogation of the contract. It is indisputably true that, before or at the time this contract is said to have been abrogated, no public interest in nor public necessity for its abrogation was made to appear in anywise.

(3) The court is in error, we submit, in conceiving that appellant seeks to have this court refuse to accept the construction put upon the Missouri statute by the Missouri Supreme Court, in so far as that court was acting in its proper and exclusive sphere. The statute, as construed by the Missouri Supreme Court, is that which the appellant attacks on the ground that the statute, *as construed*, is repugnant to the Fourteenth Amendment to the Federal Constitution. The proper construction of the statute, as bearing upon the question as to whether or not it affords due process of law, is, assuredly, for the independent decision of this court.

Appellant begs to submit herewith some suggestions in support of this petition.

Respectfully submitted,

ELLIOTT H. JONES,
Counsel for Appellant.

SCARRITT, JONES & NORTH,
Of Counsel.

Certificate of Counsel.

I, the undersigned, being of counsel for appellant herein, do hereby certify that the above petition of appellant, for a rehearing, is not made for vexation or delay, but in good faith, and in the belief that the petition is meritorious.

ELLIOTT H. JONES,
Counsel for Appellant.

SUGGESTIONS IN SUPPORT OF MOTION FOR REHEARING.

I.

In the court's opinion herein it is said that, "Under the challenged statute, defendant had opportunity to support the contract rates * * *." We interpret the court's opinion to mean that defendant may not say that it was deprived of its property (contract) without due process of law, since it was afforded an opportunity to be heard "in support" of the contract, before it was abrogated or taken away. It seems, therefore, that counsel for defendant may have been remiss in not pointing out to the court, with greater clarity and emphasis, that defendant had no such opportunity; that the statute did not afford to defendant the opportunity of a hearing "in support" of its contract, before it had been, according to the court, absolutely nullified.

It seems evident that this court was laboring under a grave misapprehension. The court must have conceived that defendant had notice of the schedule, in question, and of the filing thereof, before its contract had thereby been nullified, according to the holding of the Missouri Supreme Court. But, that is quite incorrect. The defendant had no knowledge or notice, actual or constructive, concerning said schedule before its named effective date, that is, before the abrogation of its contract, according to said court's decision, had been completely accomplished. Indeed, the gravamen of defend-

ant's appeal to this court is that the Missouri Supreme Court adjudged that its contract had been abrogated without notice and, therefore, without opportunity to be heard thereon. We thought, heretofore, that lack of notice was plain, and did not deem it necessary to stress the obvious. We, therefore, crave the earnest consideration of the court to the effort we now make to clarify this proposition.

II.

The decision of the Missouri Supreme Court was that, "we hold that the contract in controversy should be deemed nugatory from and after August 31, 1917" (Rec. 15). The court was referring to the named effective date of the schedule of rates which appellee filed, and "August 31" is, obviously, a misprint for "August 1." On that day, according to said court, defendant's contract became a nullity, and ceased to exist, and defendant had been effectually and completely deprived thereof. But, on and prior to that date defendant had not the slightest knowledge or notice, actual or constructive, of the filing of said schedule of rates.

The statute under which it is asserted that said schedule was filed (Paragraph 12 of Section 5190, Rev. Stat. of Mo., 1929) does not make the mere filing of a schedule constructive notice thereof to any utility *customer*. The statute provides neither for any actual notice being given to utility customers of the filing of a schedule of rates nor for any legal publication to serve as constructive notice. In short, the statute makes

neither requirement nor provision for notice to utility customers of the filing of a schedule of rates.

The contract here in question provides that defendant's "heating season," that is, the period during which it should be furnished steam, was from October 1st to May 31st (Rec. 50). So, the first steam heating service it received in the 1917-1918 "season" was in October, 1917. Plaintiff's said schedule, filed in June, named August 1, 1917, as its effective date, but it will be noted that plaintiff, in its petition (Rec. 25), makes no claim for steam service to defendant in August or September, 1917, the reason being, as stated, that defendant, under its contract, was not furnished steam service prior to October 1st. The petition states that defendant, for the October service, was billed on or about November 5, 1917 (Rec. 26). That was the first notice given to defendant of the filing of plaintiff's said schedule. But, at that time, the contract had passed out of the picture, had been absolutely nullified, according to the Missouri Supreme Court.

Even if it should be deemed, which seems to us impossible, that the onus would have been on defendant, if it had had notice of the schedule, to institute a proceeding or hearing in support of its contract, before the schedule had become "effective," it assuredly may not be asserted that such a burden was on defendant when it was without notice, actual or constructive, of the filing of said schedule. It must be conceded that, absent notice, opportunity of a hearing was also absent.

It is obvious, therefore, that the court was in error in saying that, "Under the challenged statute, defendant

had opportunity to support the contract rates * * *." It cannot, assuredly be said that the "challenged statute" afforded "opportunity" if, as is true, it afforded no notice.

III.

If it be suggested that it does not definitely appear in the record herein, that defendant did not have notice of said schedule, prior to its named effective date, the complete answer is that the burden was on *plaintiff* to show notice, if such there was. That there was the contract, and that it was a complete defense to this action, unless it had been legally nullified, is confessed. Therefore, to maintain its case, plaintiff had to show that the contract had been duly nullified, and had to affirmatively show that defendant had due notice, if notice was essential to its nullification. There is, assuredly, no presumption that defendant had notice of the schedule, prior to its named effective date. It is equally clear that there is no evidence that defendant had such notice. In any event, the statute does not provide for any notice, and the real issue here is, does a statute which permits one's contract to be abrogated, without notice, or which permits a person to be deprived of his property rights in a contract without notice and, therefore, without opportunity to be heard, comport with due process of law?

To state it somewhat differently, the proposition which we have endeavored to present is this. If the statute is such, as the Missouri Supreme Court holds, that this utility company was thereby authorized, and thereby delegated the power, first, to determine the public neces-

sity for the abrogation of its contract and, second, the power to itself, without the aid even of the commission, effect the abrogation of the contract and to deprive defendant of its property rights therein, by the mere doing of a voluntary act, without notice thereof to defendant, is not the statute repugnant to the 14th Amendment?

We submit that the provision of the statute, as construed by the Missouri Supreme Court, is, in substance, exactly as we have just stated it. We, therefore, now say, as we said in our brief herein for appellant (pp. 21, 22) that, "the very essence of due process of law is notice and a hearing. Both were conspicuously absent in the present instance. If said (Missouri) court has correctly construed said statute there can be no question, we submit, but that the statute undertakes to abrogate contracts, to take away property rights, without due process of law."

IV.

In addition to lack of notice, there is another reason why there was no opportunity for defendant to take action "to support" its contract. So long as plaintiff was furnishing steam service according to contract the defendant had no grievance to submit to commission or court, nor any relief to seek. If plaintiff had cut off the service, or had seriously threatened so to do, defendant might have sought relief, by mandatory injunction, from a court, but not from the commission. The latter has no judicial power. It could not have determined whether or not defendant had a contract or, if so, what its rights were thereunder, or whether it had been

abrogated, or was being breached. And, it is clear that defendant could not seek relief from a court, even, so long as the contract was being performed. There was no grievance, no controversy to submit, no relief to be sought. There was no provision in the Missouri law for a declaratory judgment concerning the contract. The Missouri Supreme Court recognizes such situation, in its opinion herein. It says, first, that "* * * the commission was without judicial power to determine finally defendant's rights under the contract," and, second, that "The usual process of the courts to determine the validity of the controverted schedules, was available to either party, although defendant was under no necessity to avail itself thereof, since the heat service was not shut off" (Rec. 13). The court should have said that defendant was "under no privilege," rather than "under no necessity" of going into court, "since the heat service was not cut off." Nothing less than a positive refusal by plaintiff to perform the contract would have justified, legally or practically, institution of any action by defendant in support of the contract. And, there is no evidence in the record here that plaintiff ever refused to perform the contract, or ever threatened, even, not to perform it. So, it is clear that no opportunity arose which required or legally permitted defendant to institute any action, "to support" its contract. As the pith of appellant's complaint is that it had neither notice nor opportunity to be heard before its contract was, assertedly, abrogated, and as this Honorable Court has, we believe, fallen into an error on that crucial matter, we

respectfully submit that the court should reconsider this case.

V.

The Missouri Supreme Court held that the contract became "nugatory from and after August 31 (1), 1917" (Rec. 15). Accordingly, when defendant was first given notice, in November, of the filing of said schedule, there was nothing it could do about its contract. It had been annulled and had ceased to exist, so the court held. In any event, to consider whether or not defendant could then have done anything "to support" its contract, held to have become defunct, would be but an academic discussion, in the case at bar. This suit was not instituted nor decided upon the theory that this contract expired on some date *after defendant received notice* of the filing of said schedule of rates, but upon the sole theory that the contract expired on August 1, 1917, regardless of notice to defendant. Plaintiff sought and was given judgment for the service rendered in October, before defendant had notice, as well as for succeeding months. The Missouri court gave no weight to the matter of notice. Indeed, its holding was, in effect at least, that no notice to defendant was necessary in order to effect the annulment of its contract by the mere act of appellee.

After defendant had notice of said schedule it might, possibly, have protested against the reasonableness of the schedule rates before the commission. But, as defendant had a contract, so it supposed, and the

same was being performed, it was not concerned with said schedule, or the reasonableness thereof to others. Furthermore, if defendant had protested against said schedule it could have obtained no better result than did the customers, without special contracts, who did protest it. They secured a decision of the commission that said schedule was unreasonable and unlawful (5 Mo. P. S. C. 664, 683). And, although that finding and decision of the commission became conclusive, in this collateral action, according to the statute (Sec. 5238, R. S. Mo., 1929), the courts refuse to give any heed to it. So, what could defendant have attained had it complained before the commission concerning said filed schedule, after it had notice thereof, and after its contract had become defunct, as the Missouri court holds?

VI.

It seems significant that in every instance, so far as we can discover, where the exact proposition here at issue has come before the courts, except in this Missouri case, the decision has been that the mere filing of a schedule of rates by a utility company, under statutes identical in substance with the Missouri statute, may not serve to abrogate a contract. We refer to the decisions in the state courts of Maine, Illinois and Kansas, and to the federal court decisions, cited on pages 17, 18 of the "Brief for Appellant" herein. It is well said by the court, in *Clancy* v. *Barker,* 131 Fed. 161, 169, that "The pregnant fact that no case can be found (in support of a certain proposition) is

the most complete demonstration that this was not the law."

We submit that there is no substance to the suggestion, if made, that the decisions cited are without weight because the Missouri court construed this statute differently from other courts, and that such construction is binding on this court. The only matter of substance in which the Missouri court and the other courts differ, in construing this statute, is that the Missouri court construes the statute as serving to abrogate a contract, in accordance with due process of law, while the other courts hold that it does not so serve. On that matter of construction this court is not bound by the decision of the Missouri court. Whether or not the statute may be properly construed as affording due process of law, as guaranteed by the Federal Constitution, is a question for the ultimate and independent decision of this court. The construction of the statute by the Missouri court, to the effect that the statute affords due process of law is not binding on this court. It is the statute, as construed by the Missouri court, which defendant attacks, on the ground that the statute, *as construed,* deprives it of its property without due process of law. We do not ask this court to overrule the Missouri Supreme Court's construction of the statute otherwise than upon the question of due process of law. We submit that the cases which we cite are influential, at least, on this proposition, the gist of those decisions being that to permit a utility company to abrogate its contract by its own voluntary act would not be in accordance with due process.

We respectfully ask that the court give particular attention to the well-considered case of *Attleboro Steam & El. Co.* v. *Narragansett El. L. Co.*, 295 Fed. 895 (R. I., 1924). The decision was delivered by the late Judge Arthur L. Brown, then district judge, but shortly thereafter promoted to circuit judge. There, as here, a utility company was asserting that the mere filing by it of a schedule of rates, under a Rhode Island statute very similar to this Missouri statute, served to abrogate a special contract it had with a customer. The grounds for denying the contention are stated by the court with great clarity and sound reasoning, and "fit like a glove" the case at bar. We quote from the opinion thus:

> "Before a contract can be interfered with under the police power, it *must appear* that the contract does in some manner affect adversely the *welfare of the public*. There is nothing in the records to show that the defendant brought to the notice of the commission any evidence that the company would be unable to perform its full duty to the community whose interest it is the function of the committee to protect. The plaintiff relies upon the contract. By answer, the defendant, as a justification for its demand for an increased rate, and for its threat to cut off the plaintiff's supply of electricity as a means of coercion to pay such increased rate, sets up its own action in filing an increased rate, and also the action of the Public Utilities Commission upon its request for a waiver of the statutory notice and for allowing the rate to become effective. * * * As the defendant has not invoked relief through the exercise of the power of the commission as a legislative agent to determine the question of the unreasonableness of the old rate, and the reasonableness of the new rate, but merely to relieve it from statutory requirements as to notice, its only defense is

its own act in increasing the rate. It has introduced no other justification than the consent of the commission to its request that it be made effective at once. It has failed therefore to show that the legislative power delegated to the commission in the public interest has ever been exercised in the interest of the public in any mode pointed out in the Public Utilities Act. The defendant is subject to public regulation *only to the extent of the public interest in its business.* * * * The defendant further contends that the mere filing of a new schedule is in itself a valid method of changing rates, and that, even if the allowance of the filing of the new rate by the commission in accordance with Section 48, did not amount to a finding as to the reasonableness of the rates, it yet waived the provision as to notice of changes, and permitted the defendant at an earlier time to exercise its own right to change a rate. *It seems evident, however, that the defendant cannot itself exercise the police power of the state to relieve it in the public interest from a burdensome contract. Nor can its own judgment be accepted by this court as a sufficient ground for disregarding the contract rights of the plaintiff. Rutland R. Lt. & Power Co.* v. *Burditt,* 94 Vt. 421, 422, 111 Atl. 582; *In re Searsport Water Co.,* 118 Me. 382, 393, 108 Atl. 452. The question of the reasonableness of what it has attempted to do, and whether the public interest is such as to override the obligation of its contract, involves an *administrative* question, which cannot be determined *by the defendant* or by this court. The statutory commission was created by the legislature to determine such questions, and the proper course is to obtain that judgment. *Legislative relief under reserved powers should be sought from the legislature's administrative agent, the Public Utilities Commission.* The result of proceedings before the commission fails to show that the defendant procured a finding of the commission that it was entitled to such relief, or that the commission, in allowing a new schedule to be

filed, added anything of force to the act of the defendant in filing of the rate. The practical effect of what was done is the same as if, after filing of the rate, the period of 30 days, fixed by Section 48 for notice, had elapsed without action by the commission. *The change therefore represents only the act of the defendant alone, and this is no ground for disregarding the contract right of plaintiff*" (italics ours).

VII.

We submit that undue influence is given by the court to the provisions of the statute which prohibit a utility company from deviating from a filed schedule of rates, and from thereby giving an "undue preference" to any customer. It would appear that such matters were eliminated, in this instance, by Section 87, Paragraph 4, of the statute, which provides that, "Nothing in this act shall be construed to prevent any (heating company) from continuing to furnish * * * service * * * at the rate or rates fixed in such contract or contracts." If, however, it be deemed that no effect should be given to that saving clause of the statute, it does not follow that appellee was at liberty to file said schedule and to then say that since it had filed that schedule, and was prohibited to deviate therefrom, it must disregard defendant's contract. Plaintiff was bound just as much by the law that it observe its contract, as it was by the law that it observe a filed schedule, even though the former law was not in a statute. Plaintiff was not required to file said schedule, and thus put itself in a position where it must breach one law to obey another. May it justify its breach of the law, which required it

to observe its contract, by voluntarily filing a schedule and then saying that the law required it to observe the schedule? That would be permitting plaintiff to gain an advantage by virtue of its own wrongdoing. Is it not clear that plaintiff's proper and only course, in keeping with all the law, would have been to have first obtained relief from this contract, if it was entitled thereto, by proper procedure before the commission, before it attempted to file a schedule which would be applicable to defendant? That was the course pursued by the utility company in the case of *State ex rel. Washington University* v. *Public S. C.*, 308 Mo. 328, and in other Missouri cases which plaintiff here relies upon. This case is here before this court because plaintiff failed to pursue said lawful course.

VIII.

Another proposition was, apparently, overlooked by the court, as it was not mentioned in the opinion herein. We believe that the court will deem the proposition to be quite important, now that the court understands that defendant had no notice of said filed schedule, prior to its named effective date. The principle has been thoroughly established by the decisions of this court that the legislative function to nullify contracts, such as we have here, is not an *independent* one, that it does not exist *per se,* and that such power arises only *upon the condition* that it is *made to appear* that the public necessity requires it, in any given instance. In the case of *Ark. Nat. Gas. Co.* v. *Ark. Rd. Comm.,* 261 U. S. 379, this court said:

> "* * * it is not an independent legislative function to vary or set aside such contracts, however unwise and unprofitable they may be. *Indeed, the exertion of legislative power solely to that end is precluded by the contract impairment clause of the constitution.* The power does not exist *per se.* It is the intervention of the *public interest* which justifies, and at the same time, *conditions, its exercise*" (italics ours).

The decision of the Missouri Supreme Court was that the nullification of the contract in controversy was effected on August 1, 1917, by the mere filing of a schedule by plaintiff, in June. At that time no public necessity for, nor public interest in, the nullification of the contract was made to appear, by legislative finding or otherwise, unless it can be said that the filing of said schedule showed that it was the judgment of the *utility company* that the contract ought to be abrogated, in the public interest, and that *its judgment* was conclusive. Doubtless the legislature could have delegated to the Public Service Commission the power to make such a finding, after a proper hearing, but it is clear that the legislature could not delegate such power to the utility company (*Attleboro Steam & El. Co.* v. *Narragansett El. L. Co.*, 295 Fed. 895). We may infer from the opinions of the Missouri Supreme Court and of this court that it was deemed that the commission did, in 1919, make such a finding as to indicate that there was a public interest in the abrogation of this contract, in 1917, although this contract was not referred to in any manner in said decision of the commission (8 Mo. P. S. C. 223). Note that said decision was rendered long after

this contract had been performed, and had expired. For it is an indisputable fact that this contract was performed. Plaintiff may have reluctantly performed it, but it did, indeed, perform it. Is it not true that the utmost that can be said of the findings made by the commission, in 1919, is that the commission then indicated that this contract might well have been abrogated before it was completely performed, if its abrogation had been duly sought? It may be, as counsel for appellee contend, that a finding and decision of the commission, upon a hearing, is the same as the enactment of a law by the legislature. But, it is also true that the Missouri Constitution (Section 15, Art. II) forbids the enactment of a law "retroactive in its operation." It is clear, therefore, that the decision of the commission, in 1919, after this contract had been performed, could not operate retroactively so as to effect or so as to be the basis of, the abrogation of this contract, in 1917. It must, we submit, be confessed that no public interest in nor necessity for the abrogation of this contract was made to appear at the time it was said to have been abrogated, or before it was fully performed. But, the law, as established by this court, is that the power to abrogate a contract is *conditioned* upon it being made to appear that public necessity requires it. After the contract was performed, whether or not it ought, in the public interest, to have been performed, was at best, but a moot question. Furthermore, it is obvious that of appellee's vast business this small contract was a mere drop in the bucket. The contract was performed, at the con-

tract rate; and history has demonstrated that the public welfare was not thereby affected, in the least degree. It may be that plaintiff lost a little money in performing an improvident contract, but that is wholly immaterial, if it be true.

Respectfully submitted,

ELLIOTT H. JONES,
Counsel for Appellant.

SCARRITT, JONES & NORTH,
Of Counsel.

In the

Supreme Court of the United States

October Term, 1936.

No. 217.

MIDLAND REALTY COMPANY, *Appellant,*

vs.

KANSAS CITY POWER & LIGHT COMPANY, *Appellee.*

SUGGESTIONS IN OPPOSITION TO APPELLANT'S PETITION FOR A REHEARING.

LUDWICK GRAVES,
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Counsel for Appellee.

SMITH-GRIEVES, LAW PRINTERS, KANSAS CITY, MO.

In the

Supreme Court of the United States

October Term, 1936.

No. 217.

MIDLAND REALTY COMPANY, *Appellant*,

vs.

KANSAS CITY POWER & LIGHT COMPANY, *Appellee*.

SUGGESTIONS IN OPPOSITION TO APPELLANT'S PETITION FOR A REHEARING.

Appellant's petition for rehearing is bottomed upon six propositions, all of which were thoroughly briefed and argued by both sides prior to the court's opinion. They are, in order:

1. Appellant had no notice of the filing of the schedule of rates effective August 1, 1917, and therefore it could not have attacked it.

2. The mere filing of a schedule of rates, without any affirmative act of the Public Service Commission approving the new rates, cannot supersede contract rates.

3. The appellant was under no duty to object to the newly filed schedule of rates so long as appellee did not discontinue service.

4. The courts of many states other than Missouri have placed a construction upon their own statutes which is different from that placed upon the Missouri statutes by the Supreme Court of Missouri.

5. By virtue of Section 5208, R. S. Mo. 1929, the legislature expressly preserved contracts existing at the time the Public Service Commission law was enacted and therefore it was not unlawful for appellee to charge different rates to different customers.

6. In order for commission rates to supersede contract rates, there must be a finding by the commission that public necessity and public welfare requires it.

We beg leave to discuss these points quite briefly.

1.

Appellant strenuously contends that the court is in error when, in its opinion, it says "Under the challenged statute, defendant had opportunity to support the contract rates and to test before the commission and in the state supreme court—as others did—the validity of the filed schedules. (Citing cases, statutes.) It failed to do so." Appellant contends it could not have attacked the filed rates (and thus supported the contract rates) because it had no actual or constructive notice of the filing of a new schedule of rates.

The answer to this contention now is the same as it was when appellant raised the same question in its brief. We said then (appellee's brief, pp. 33, 34) "The Public Service Commission Act provides that any interested

party may intervene in any proceeding before the commission. Section 5232, R. S. Mo. 1929, Vol. I, p. 1472. Many customers did intervene in cases 1353 and 1615. * * * Since appellant did not avail itself of the opportunity of being heard by the commission in either of the proceedings, it should not now be rewarded therefor."

Appellant apparently loses sight of the express provisions of Section 5190, R. S. Mo. 1929 (Section 12, Vol. I, p. 1448), when it complains it had no actual *or constructive* notice of the new schedule. Said section provides, in part:

> "* * * no change shall be made in any rate * * * except after thirty days' notice to the commission, *and publication for thirty days* as required by order of the commission * * *" (emphasis supplied).

Obviously the *publication for thirty days* was intended to apprise, by constructive notice, all persons (other than the utility and the commission) who might be interested.

2.

Appellant's next contention is that the mere filing of a schedule of rates, without any affirmative act of the commission approving the new rates, cannot supersede contract rates.

This proposition was briefed by appellant (Brief, pp. 11-22) and by appellee (Brief, pp. 24-32).

That the court considered the contention and ruled it adversely to appellant is evidenced by the court's language, "It is clear that, as against those (rates) specified in the contract here involved, the rates first filed by plain-

tiff * * * have the same force and effect as if directly prescribed by the legislature (citing cases)."

Appellant presents no new argument for the reconsideration of the proposition and we will not burden the court with a repetition of our argument as presented in the brief.

3.

It is claimed by appellant that this cause should be reheard because the court was in error in holding the burden was on appellant to attack the new rates. The reason assigned is that appellee did not discontinue service; therefore, appellant was under no duty to act.

This point was likewise briefed by both parties before the argument (Appellant's Brief, pp. 23, 25; Appellee's Brief, p. 34).

It was considered by the court and ruled adversely to appellant in this language, "Defendant was not injured by plaintiff's failure to withhold service * * *. It cannot derive any advantage from refusal to pay."

There is no valid reason why appellant could not have objected, within thirty days before August 1, 1917, to the taking effect of the new schedule as to it, upon the ground that it had a contract. Likewise, there is no valid reason why it could not have intervened (as many customers did) in case No. 1353 as to the second schedule.

Appellant is presumed to have known that unless it did so object or intervene, the new rates upon their effective dates would supersede the contract rates.

4.

Appellant also complains that courts of states other than Missouri have construed their own statutes differently than has the Supreme Court of Missouri. We do not deny this. But as this Court said in the opinion in the case at bar, "These questions are to be decided upon the construction that the state supreme court put upon the statute."

The state supreme court held the contract rates were superseded by the filed and published rates and this Court found that decision did not violate the Federal Constitution because the proceedings employed in the annulment of the contract rates were orderly, were with due process of law. Appellant failed to make use of the remedies accorded by the very statute it now attacks. This being so, what difference does it make that courts of other states have held their statutes are not of the same effect as the Missouri statute?

5.

Appellant again presents to the Court the same argument as was presented in its brief (pp. 28-32) and answered by appellee in its brief (pp. 37-41), namely, the legislature by Section 5208, R. S. Mo. 1929, expressly "* * * inhibited the abrogation of the contract in question" (Appellant's Brief, p. 10).

It was made unlawful by Section 5190 for a utility to receive a greater or less compensation for its service than the rates applicable to such service as specified in its schedule filed and in effect at the time. If the Supreme Court of Missouri had not interpreted Section 5208 the

way it did, the plain provisions of Section 5190 would have been nullified.

6.

Finally, appellant contends that a contract rate cannot be superseded by a filed rate without a showing that public welfare and public necessity requires it. This has never been the law in Missouri. It has been held in Missouri, without exception, that a schedule of rates filed and published in accordance with Section 5190 acquires the force and effect of law and that if contract rates come in conflict with filed and published rates, the former are "of no vitality." (See cases cited in appellant's brief, pp. 10-24.) Since the statutes of Missouri require no such showing, none need be made.

Respectfully submitted,

LUDWICK GRAVES,
IRVIN FANE,
Counsel for Appellee.

SUPREME COURT OF THE UNITED STATES.

No. 217.—October Term, 1936.

Midland Realty Company, Appellant,
vs.
Kansas City Power and Light Company.

Appeal from the Supreme Court of the State of Missouri.

[February 1, 1937.]

Mr. Justice Butler delivered the opinion of the Court.

The questions for decision are whether, as construed in this case by the highest court of Missouri, the statutes of that State regulating public utilities violate Art. I, § 10 of the Constitution of the United States, declaring that "No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . .", or § 1 of the Fourteenth Amendment declaring "nor shall any State deprive any person of life, liberty, or property, without due process of law."

Appellee was plaintiff and appellant defendant below. They made a contract whereby the former for specified rates agreed to furnish the latter steam for heating its buildings in Kansas City for a term of five years ending August 31, 1913, with option to defendant to extend the contract for an additional five years. March 17, 1913, the state public service commission law was enacted.[1] May 29, following, defendant exercised its option and so extended the term of the contract to August 31, 1918.

June 28, 1917, plaintiff in pursuance of the statute[2] filed with the commission a schedule of steam heating rates to become effective August 1, 1917; they were higher than those specified in the contract. The city and numerous users other than defendant objected; the commission, without attempting to apportion operating expenses and values between plaintiff's heating and electric service, found that the rates filed were unreasonably high and

[1] Missouri R. S., 1929, c. 33, §§ 5121 *et seq.*

[2] Missouri R. S., 1929, §§ 5190 (12), 5209.

prescribed, as just and reasonable, rates lower than those filed but higher than the contract rates and made them effective March 1, 1918. 5 Mo. P. S. C. 664. Plaintiff filed a new schedule in accordance with the commission's order.

June 11, 1918, it complained that these rates were confiscatory. The commission, after apportioning operating expenses and values between the electrical and steam services, found the rates "inadequate, unjust and unreasonably low," that during none of the time was "heating revenue sufficient to even meet the fuel expense alone", and that "heretofore the steam heating business has been carried at a loss, and this loss has been borne either by the light and power consumers or by the company". Thereupon, it ordered new and higher rates effective December 1, 1919. 8 Mo. P. S. C. 223, 292, 296. The findings and order of the commission were approved by the supreme court in *State ex rel. Case* v. *Public Serv. Comm.*, 298 Mo. 303.

For steam furnished defendant after August 1, 1917, plaintiff regularly sent bills based on the rates it had filed with the commission. Claiming the contract rates still to be applicable, defendant paid amounts calculated in accordance with them. Plaintiff gave defendant credit for the payments it made. After expiration of the period covered by the contract as extended, plaintiff brought this suit. For steam furnished after August 1, 1917, and before March 1, 1918, it sought to recover on the basis of the charges specified in the first schedule filed. For steam furnished after March 1, 1918, to the end of the contract term, it sought to recover on the basis of charges of the schedule promulgated by the commission. The trial court held plaintiff not entitled to recover on its claim in respect of the first period but gave judgment in its favor in respect of the other one. Both parties appealed. The Missouri supreme court ruled the contract rates not applicable, held plaintiff entitled to recover on its claim in respect of both periods and directed that it have judgment for the sums calculated on the basis of the schedules filed with the commission.

Defendant's contention is not that the State lacked power by appropriate action to establish and enforce just and reasonable rates but that, as against the constitutional provisions invoked, the action taken under the public service commission law was not sufficient to abrogate the contract rates.

Specifically, its complaints are that the court construed the statute (1) to make (a) mere filing of plaintiff's schedule and (b) the later promulgation of a schedule by the commission effective to abrogate the contract rates and (2) to require that, although the contract was in due time fully performed and defendant prior to the commencement of the suit had paid plaintiff the contract rates, it was bound to pay additional amounts calculated on the basis of the higher rates specified in plaintiff's published schedules. It is upon these grounds that defendant contends that the state law violates the quoted clauses of the Constitution.

These questions are to be decided upon the construction that the state supreme court put upon the statute. And that law is to be taken as if it declared that rates made in accordance with its provisions shall supersede all existing contract rates.[3] There is here involved no question as to the validity of the rates prior to the passage of the statute. Without expression of opinion, we assume that then the parties were bound by the contract. But the State has power to annul and supersede rates previously established by contract between utilities and their customers.[4] It has power to require service at nondiscriminatory rates, to prohibit service at rates too low to yield the cost rightly attributable to it,[5] and to require utilities to publish their rates and to adhere to them.[6] Under the challenged statute, defendant had opportunity to support the contract rates and to test before the commission and in the state supreme court—as others did—the validity of the filed schedules.[7] It failed to do so. And it here insists that the contracts could not be abrogated "without a proper

[3] City of Fulton *v.* Public Service Commission, 275 Mo. 67. Sedalia *v.* Pub. Serv. Comm., 275 Mo. 201, 209. Bolt & Nut Co. *v.* Light & Power Co., 275 Mo. 529; affirmed 252 U. S. 571. State ex rel. Washington University *v.* Public Serv. Comm., 308 Mo. 328, 342. State ex rel. Publ. Serv. Co. *v.* Latshaw, 325 Mo. 909, 917-918. State ex rel. Kirkwood *v.* Pub. Serv. Comm., 330 Mo. 507, 521.

[4] Union Dry Goods Co. *v.* Georgia P. S. Corp., 248 U. S. 372. Producers Transp. Co. *v.* R. R. Comm., 251 U. S. 228, 232. Kansas City Bolt & Nut Co. *v.* Kansas City Light & Power Co., 252 U. S. 571. Sutter Butte Canal Co. *v.* R. R. Comm'n, 279 U. S. 125, 137-138.

[5] Pub. Serv. Comm'n *v.* Utilities Co., 289 U. S. 130, 135-136. Cf. Nor. Pac. Ry. *v.* North Dakota, 236 U. S. 585, 604.

[6] Armour Packing Co. *v.* United States, 209 U. S. 56, 81. Louis. & Nash. R. R. *v.* Maxwell, 237 U. S. 94, 97.

[7] Missouri R. S., 1929, §§ 5191, 5232-5237. See State ex rel. Washington University *v.* Public Serv. Comm., 308 Mo. 328.

hearing, finding and order of the commission with respect thereto." It does not, and reasonably it could not, contend that immediate exertion by the legislature of the State's power to prescribe and enforce reasonable and nondiscriminatory rates depends upon or is conditioned by specific adjudication in respect of existing contract rates.[8] It is clear that, as against those specified in the contract here involved, the rates first filed by plaintiff and those promulgated by the commission in accordance with the statute have the same force and effect as if directly prescribed by the legislature.[9]

Lacking in merit is defendant's contention that the statute violates the clauses of the Constitution invoked because held by the court to require that, although before this suit the service had been furnished and paid for in accordance with the contract, defendant was bound to pay more. As shown above, the rates specified in the schedules were held applicable from and after their respective effective dates. Defendant was not injured by plaintiff's failure to withhold service or more promptly to sue for the difference between its lawful charges and the amount paid. It cannot derive any advantage from refusal to pay.[10]

Plainly, enforcement of the rates in accordance with the statute did not violate either the contract clause of the Constitution or the due process clause of the Fourteenth Amendment.

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S

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[8] Louisville & Nashville R. R. *v.* Mottley, 219 U. S. 467.

[9] Pub. Serv. Comm. *v.* Pavilion Nat. Gas Co., 232 N. Y. 146, 150-151. Town of North Hempstead *v.* P. S. Corp., 231 N. Y. 447, 450.

[10] L. & N. R. R. *v.* Central Iron Co., 265 U. S. 59, 65.